TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 804

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

vs.

FLORENCE BLYTHE HINCKLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED **189 .**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 30, 1897.

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S. F. No. 98.

In the Supreme Court of the State of California.

Estate of THOMAS H. BLYTHE, Deceased.

Transcript on Appeal from Decree of Distribution and from Order Denying Motion for New Trial, by Henry T. Blythe et al., Appellants.

S. W. & E. B. Holladay, attorneys for Henry T. Blythe *et al.*, appellants.

W. H. H. Hart, attorney for Florence Blythe Hinckley, petitioner.

Garber, Boalt & Bishop, of counsel.

Filed this 2nd day of May, 1895.

T. H. WARD, *Clerk*,
By J. J. DUNCAN,
Deputy Clerk.

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In the Supreme Court of the State of California.

In the Superior Court in and for the City and County of San Francisco, State of California, Department 9.

In the Matter of the Estate of THOMAS H. BLYTHE, Deceased. No. 2401.

Bill of Exceptions of Henry T. Blythe et al., to be Used upon Their Motion for a New Trial and also upon Their Appeal from the Decree of Distribution.

Be it remembered, that heretofore, to wit: on June 18, 1894, Florence Blythe (since called Florence Blythe Hinckley,) filed in the above-entitled court and estate her duly verified petition, praying for an order of said court distributing to her the share of the estate of said Thomas H. Blythe, deceased, to which she is

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entitled, to wit: all the property and funds belonging to said estate, except what may be sufficient to pay the cost and expenses of administration remaining unpaid, upon her giving bond with security to the administrator of said estate for the payment, whenever required, of her proportion of the debts due from said estate, to wit: the whole of the debts, if any, due from said estate, not exceeding the value or amount of the portion of said estate to which she is entitled, the sureties on said bonds to be approved by the judge of the superior court; and for such other or further order or relief as may be just.

Of which petition (omitting the verification and descriptions of property and other matters unnecessary to the point made in this bill of exceptions—E. S. B.) the following is a copy:

(Title of Court and Estate.)

"To the honorable the superior court of the city and county of San Francisco, State of California:

Your petitioner, Florence Blythe Hinckley, a resident of said city and county of San Francisco, respectfully alleges and shows—

That on the 12th day of June, A. D. 1883, said superior court of said city and county of San Francisco did duly make and give its judgment wherein it did appoint one Philip A. Roach administrator of the estate of said Thomas H. Blythe, deceased; and pursuant to said judgment letters of administration upon the estate of said Thomas H. Blythe, deceased, were, on June 12th, A. D. 1883, issued to said Philip A. Roach, who thereupon, on the day and
5 year last aforesaid, duly qualified as such administrator, and thereafter continued to be the duly appointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased, until the 27th day of April, 1889, on which last-mentioned day said Philip A. Roach died; that thereafter, and on the 10th day of May, 1889, said superior court of said city and county of San Francisco did duly make and give its judgment, wherein and whereby it did appoint James C. Pennie administrator of the estate of said Thomas H. Blythe, deceased, in the place and stead of Philip A. Roach, deceased; and pursuant to said judgment letters of administration upon the estate of Thomas H. Blythe, deceased, were, on the 10th day of May, 1889, issued to said James C. Pennie, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and thereafter continued to be the duly appointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased, until the 9th day of December, 1893, upon which last-mentioned day said James C. Pennie died; that thereafter, and on the 26th day December, 1893, the said superior court of said city and county of San Francisco did duly make and give its judgment, wherein and whereby it did appoint A. C. Freese administrator of the estate of said Thomas H. Blythe, deceased, in the place and stead of said James C. Pennie, deceased; and pursuant to said judgment letters of administration upon the estate of said Thomas H. Blythe, deceased, were, on the 26th day of December, 1893, issued to said A. C. Freese, who thereupon, on the
6 day and year last aforesaid, duly qualified as such administrator, and has ever since been, and still is, the duly appointed, qualified and acting administrator of the said estate of said Thomas H. Blythe, deceased.

Your petitioner further alleges, that after the expiration of one year from the issuing of letters of administration to said Philip A. Roach upon the estate of Thomas H. Blythe, deceased, as hereinbefore stated, to wit: on the 1st day of October, A. D. 1885, your petitioner, claiming to be the sole heir of said deceased, and to be entitled to distribution of the whole of said estate, did, under the name of Florence Blythe, file in the aforesaid superior court, in the matter of the above-entitled estate of said Thomas H. Blythe, deceased, her petition therein, setting forth her right to said estate,

and her kinship, heirship and relationship to said Thomas H. Blythe, deceased, therein and thereby praying said court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made, and praying for the making of an order fixing the date, and for issuing a notice requiring all persons having or claiming any interest in the estate of said Thomas H. Blythe, deceased, to appear in said court in the matter of said estate, under and in accordance with the provision of section 1664 of the Code of the State of California; which said petition remains on file in the matter of the said estate in said court, and was sufficient in form to entitle said plaintiff to the relief, orders and notices therein asked for; and thereafter, to wit: on the 15th day of October,
7 A. D. 1885, said petition regularly came on for consideration by the court, and on that day such proceedings were had thereon, that said court duly made and gave an order fixing Monday, February 1st, A. D. 1886, at the hour of 10 a. m., at the court-room of said court, in the new city hall, in said city and county of San Francisco, as the time and place for the appearance of all persons, known or unknown, having or claiming any interest in the estate of Thomas H. Blythe, deceased, which order directed service of notice to all persons interested in said estate to appear and show cause on a date therein named, not less than sixty days nor more than four months from the date of making of said order, to wit: on February 1st, A. D. 1886, in the matter of said estate, which order was, on the 15th day of October, A. D. 1885, duly filed in said court, and thereafter such proceedings were duly had pursuant to said last-named order that on October 16th, A. D. 1885, a notice, as by said order required, was duly given, in which notice, as under and by said order directed, was set forth the name of Thomas H. Blythe, deceased, the name of Philip A. Roach, then administrator of the estate of Thomas H. Blythe, deceased, the names of all the persons who had appeared claiming any interest in said estate, in the course of the administration of the estate, up to the time of the making of the said order, and such other persons as the court directed; and also a description of the real estate whereof said Thomas H. Blythe, deceased, died seized or possessed, so far as known, described
8 with certainty to a common intent, which notice required all said persons, and all persons named or not named, having or claiming any interest in the estate of said Thomas H. Blythe, deceased, at the time and place in said order specified, to wit: on Monday, February 1st, A. D. 1886, at the hour of 10 a. m., at the court-room of said court, in the new city hall, in said city and county of San Francisco, to appear and exhibit to said court in the manner provided by law their respective claims to heirship, ownership or interest in said estate; and thereafter such proceedings were duly had in said matter that said notice was duly and legally served upon all parties within the time and in the manner and form required by law, and the order of said court, and full and complete proof of such service was made to the satisfaction of said court; and thereupon, to wit: on the 5th day of February, A. D.

1886, said court duly gave, made and entered its order, judgment and decree, establishing proof of the full and complete service of said notice, as in and by said order directed, and as by law provided and required; that thereafter there appeared in the matter of said estate, the following-named persons: * * * (naming all the parties who did then appear, including these parties called in this bill of exceptions Henry T. Blythe *et al.*,) and Philip A. Roach, administrator of the estate of said Thomas H. Blythe, deceased.

And your petitioner, pursuant to said notice, and within the time required thereby, and by law, did also appear in obedience thereto, an entry of which appearance was duly made in the min-
9 utes of said court and in the register of the proceedings of said estate.

That after the expiration of the time limited for appearance of all persons known or unknown therein, said court did, to wit: on the 24th day of February, A. D. 1886, give, make and enter its order, judgment and decree, wherein and whereby it adjudged the default of all persons for not appearing as required in and by said notice, who had not appeared as so required, which order and judgment still remains in full force and effect.

That thereafter, and within the time prescribed by law, your petitioner did file her complaint in the matter of said estate of said Thomas H. Blythe, deceased, setting forth the facts constituting her claim of heirship, ownership and interest in said estate, and did serve a copy of the same upon each of the parties who had appeared as aforesaid.

That all of the parties who appeared as aforesaid, other than your petitioner, were made defendants in said complaint.

That after said Pennie qualified as administrator of the estate of said Thomas H. Blythe, deceased, as hereinbefore stated, and prior to the time the decision and judgment hereinafter mentioned were given and made, the said Pennie, as such administrator, was duly substituted as one of the defendants in the cause in which said complaint was filed in the place and stead of Philip A. Roach, deceased.

That thereafter said persons who had so appeared as aforesaid, claiming heirship, ownership or interest in said estate, filed
10 their respective answers to the said complaint of petitioner and their respective pleadings in said matter therein, respectively setting forth the facts constituting their respective claims of heirship, ownership and interest in said estate; and thereafter, in due course, the said cause, and the issues arising upon said complaint, answer and pleadings, and all of the claims of heirship, ownership and interest in said estate of all the said persons, came on regularly for trial before the said court, and were tried by the said court upon the merits thereof, and the same were in due course regularly submitted to the court for adjudication and decision; and thereafter, to wit, on the 22d day of October, 1890, the said court, in said matter, duly gave and made its decision in writing, and duly gave, made and entered its judgment therein, and

by which judgment it was adjudged and decreed that Florence Blythe, your petitioner, was and is the child and daughter of said Thomas H. Blythe, deceased. That said Thomas H. Blythe, deceased, legally adopted your petitioner as his lawful child and heir; that your petitioner is the sole owner of all of the estate of said Thomas H. Blythe deceased, of every name, nature and description, wherever situate; and that your petitioner is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have or receive distribution of the estate of the said Thomas H. Blythe, deceased; and adjudged and decreed that all the defendants in said proceeding, and all persons, known or unknown, other than your petitioner, Florence Blythe, are
11 not, nor is any of them, entitled to distribution in whole or in part of any of the estate of said Thomas H. Blythe, deceased; nor are they, or any of them, heirs or any heir of said Thomas H. Blythe, deceased; nor have they, or any of them, any ownership of or interest in the estate of said Thomas H. Blythe, deceased.

That said decision, so duly given and made as aforesaid, was and is in the words and figures following, to wit:

In the Superior Court of the State of California in and for the City and County of San Francisco.

In the Matter of the Estate of THOMAS H. BLYTHE, Deceased; Florence Blythe, a Minor, by James Crisp Perry, the Guardian of Her Person and Estate, Plaintiff,

vs.

ABBIE AYRES * * * (Naming as Defendants Each of the Parties Who Had Appeared as Aforesaid, Including These Claimants, Defendants, Called in this Bill of Exceptions Henry T. Blythe *et al.*), Defendants.

Findings.

This cause having been regularly called for trial before the
12 court, all of the parties thereto, whose default had not been entered, appeared by their respective attorneys. A trial of said cause by jury was thereupon waived by oral consent of all said parties in open court, and such waiver was duly entered in the minutes of said court in said cause, and thereupon the respective parties aforesaid, plaintiffs and defendants in said cause, adduced evidence in support of their respective allegations; and the arguments of counsel having been heard thereon, said cause was submitted to the court for decision; and the court having fully considered all and singular the facts and the law in the premises, does here now make and file its findings of fact and conclusions of law, as follows, to wit:

I.

The plaintiff herein, Florence Blythe, was born on the 18th day of December, A. D. 1873, and on July 11th, 1883, and prior thereto,

she was, and hence hitherto has been, and still is, a resident of said city and county.

The true name of said plaintiff is and always has been Florence Blythe, (sometimes called Flora Blythe,) and she was and is the daughter and child of said Thomas H. Blythe and Julia Perry, who subsequently married one Joseph James Ashcroft; that plaintiff was born in England; that her mother was a native and resident of England, and continued to reside there until about one month after the death of said Thomas H. Blythe; that said child, the plaintiff herein, remained in England until after the death of the said
13 Thomas H. Blythe, when she came to California; that said Thomas H. Blythe was never at any time within any of the countries of Europe after the 29th day of August, 1873.

II.

On July 11th, A. D. 1883, said James Crisp Perry presented to the superior court of said city and county of San Francisco, his petition setting forth all the matters and things required by law to be set forth in that behalf, praying that he be appointed guardian of the person and estate of said Florence Blythe; and thereafter such proceedings were had by such superior court upon such petition that afterwards, to wit: on August 13, 1883, said superior court did duly make and give its judgment, wherein and whereby it did appoint said James Crisp Perry the guardian of the person and estate of said Florence Blythe; and afterwards, to wit: on the 15th day of August, A. D. 1883, pursuant to said judgment, letters of guardianship of the person and estate of said plaintiff, Florence Blythe, were by said court duly issued to said James Crisp Perry, who thereupon, to wit: on the day last aforesaid, duly qualified and entered upon the discharge of his duties as such guardian, and has ever since continued to act, and is now acting, and still is, the general guardian of said plaintiff, Florence Blythe, and said letters are in full force and have not been revoked.

The true name of said guardian is and at all times was James Crisp Perry.

14 III.

Said Thomas H. Blythe was born in Wales, in the United Kingdom of Great Britain and Ireland, on the 30th day of July, 1822, and became a citizen of the State of California and of the United States, August 31st, A. D. 1855, and so continued up to the time of his death on the 4th day of April, A. D. 1883. The true name of the said Thomas H. Blythe was Thomas William and the name of Thomas H. Blythe was adopted by him only upon his leaving his native country and during his residence in the State of California, and he was by that name naturalized on said August 31, 1855.

Said Thomas H. Blythe arrived in San Francisco on the 4th of August, 1849, on the ship Antelope, Ayshford, master, from Liverpool, and then and there took up his residence and continued to reside there until his death, April 4, 1883.

IV.

Said Thomas H. Blythe died intestate in the city and county of San Francisco, State of California, on the 4th day of April, A. D. 1883, he then and there being over the age of sixty years, and was at the time of his death the owner and in possession of the real estate situate in said city and county and State and elsewhere, particularly mentioned and described in paragraph IX of said plaintiff's original and last amended complaint herein, for a description of which real estate reference is hereby made to said paragraph IX of said complaint, which for that purpose, is hereby referred to and made a part hereof.

V.

On the 12th day of June, A. D. 1883, said superior court of said city and county of San Francisco did duly make and give its judgment, wherein it did appoint one Philip A. Roach administrator of the estate of said Thomas H. Blythe, deceased; and pursuant to such judgment letters of administration upon the estate of said Thomas H. Blythe, deceased, were, on July 12th, A. D. 1883, issued to said Philip A. Roach, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and thereafter continued to be the duly appointed, qualified and acting administrator of the estate of Thomas H. Blythe, deceased, until the 27th day of April, 1889, on which last-mentioned day said Philip A. Roach died. Thereafter, and on the 10th day of May, 1889, said superior court of said city and county of San Francisco did duly make and give its judgment, wherein and whereby it did appoint the defendant, James C. Pennie, administrator of the estate of said Thomas H. Blythe, deceased, in the place and stead of Philip A. Roach, deceased; and pursuant to such judgment letters of administration upon the estate of Thomas H. Blythe, deceased, were, on the 10th day of May, 1889, issued to said James C. Pennie, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and has ever since been, and still is, the duly appointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased, and after so qualifying he was duly substituted as one of the defendants herein, in the place and stead of Philip A. Roach, deceased.

VI.

The estate of said Thomas H. Blythe, deceased, has not, nor has any part thereof, been distributed, and no proceedings for final or any distribution thereof have been had in the matter of said estate in said court, or elsewhere, or at all; and said Thomas H. Blythe, deceased, died intestate, leaving no will, and no will of said Thomas H. Blythe, deceased, has ever been found, or filed, or offered for probate in said superior court, or elsewhere, or at all.

VII.

Said Florence Blythe was and is the only child and daughter of said Thomas H. Blythe, deceased, and said Thomas H. Blythe, deceased, at the time of his death had no other child or offspring than said Florence Blythe.

VIII.

Said Thomas H. Blythe died, leaving him surviving no wife, no father, no mother, no brother, and no child or children save and except said Florence Blythe, the plaintiff herein.

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IX.

After the expiration of one year from the issuing of letters of administration to said Philip A. Roach upon the estate of said Thomas H. Blythe, deceased, as hereinbefore stated, to wit: on the 1st day of October, A. D. 1885, said plaintiff filed, in the aforesaid superior court, in the matter of the above-entitled estate of said Thomas H. Blythe, deceased, her petition therein, setting forth her right to said estate, and her kinship, heirship and relationship to said Thomas H. Blythe, deceased, therein and thereby praying said court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made, and praying for the making of an order fixing a date, and for issuing a notice requiring all persons having or claiming any interest in the estate of said Thomas H. Blythe, deceased, to appear in said court in the matter of said estate, under and in accordance with the provisions of section 1664 of the Code of Civil Procedure of the State of California, which said petition remains on file in the matter of said estate in said court, and reference to which is hereby made for greater certainty, and was sufficient in form to entitle said plaintiff to the relief, orders and notices therein asked for; and thereafter, to wit: on the 15th day of October, A. D. 1885, said petition regularly came on for consideration by the court, and on that day, such proceedings were had thereon that said court duly made and gave an order fixing Monday, February 1st, A. D. 1886,

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at the hour of 10 a. m., at the court-room of said court, in the new city hall, in said city and county of San Francisco, as the time and place for the appearance of all persons, known or unknown, having or claiming any interest in or to the estate of Thomas H. Blythe, deceased, which order directed service of notice to all persons interested in said estate, to appear and show cause on a date therein named, not less than sixty days nor more than four months from the date of the making of said order, to wit, on February 1st, A. D. 1886, in the matter of said estate, which order was, on said 15th day of October, A. D. 1885, duly filed in said court, and now remains of record therein, reference to which is hereby made for certainty; and thereafter such proceedings were duly had, pursuant to said last-named order, that on October 16th, A. D. 1885, a notice, as by said order required, was duly given, in

which notice, as under and by said order directed, was set forth the name of Thomas H. Blythe, deceased, the name of Philip A. Roach, then administrator of the estate of Thomas H. Blythe, deceased, the names of all persons who had appeared, claiming any interest in, said estate, in the course of the administration of the estate, up to the time of the making of the said order, and such other persons as the court directed; and also a description of the real estate whereof said Thomas H. Blythe, deceased, died seized or possessed, so far as known, described with certainty to a common intent, which notice required all said persons, and all persons named or not named, having or claiming any interest in the estate of said Thomas H. Blythe, deceased, at the time and place in said
19 order specified, to wit: on Monday, February 1st, A. D. 1886, at the hour of 10 a. m., at the court-room of said court, in the new city hall, in said city and county of San Francisco, to appear and exhibit to said court, in the manner provided by law, their respective claims to heirship, ownership, or interest in said estate; and thereafter such proceedings were duly had in said matter that said notice was duly and legally served upon all parties within the time and in the manner and form required by law and the order of said court; and full and complete proof of such service was made to the satisfaction of said court; and thereupon, to wit, on the 5th day of February, A. D. 1886, said court duly gave, made and entered its order and decree, establishing proof of the full and complete service of said notice, as in and by said order directed, and as by law provided and required; to which order and decree, as the same now remains of record in said court, reference is hereby made for greater certainty. And thereafter the defendants above named appeared in the matter of said estate, as by law in such cases made and provided; and after the expiration of the time limited for appearance of all persons known or unknown therein, said court did afterwards, to wit, on the 24th day of February, A. D. 1886, duly make and give its order, judgment and decree, wherein and whereby it adjudged the default of all persons not appearing as required in and by said notice who did not appear therein, which order and judgment still remains in full force
20 and effect; and reference thereto, as the same remains of record, is hereby made for greater certainty.

The plaintiff, pursuant to said notice, and within the time required thereby, and by law, did appear in obedience thereto; and thereafter, and within the time prescribed by law, did file her complaint in the matter of said estate of said Thomas H. Blythe, deceased, setting forth the facts constituting her claim of heirship, ownership and interest in said estate, and did serve a copy of the same upon each of the parties who had appeared as aforesaid.

X.

That said Thomas H. Blythe was the father of said plaintiff, Florence Blythe, and said Julia Perry was the mother of said Florence Blythe; said Thomas H. Blythe and said Julia Perry never

were married; that said Florence Blythe was born the illegitimate child of said Thomas H. Blythe and said Julia Perry, and was begotten under promise of marriage while said Thomas H. Blythe was temporarily sojourning in England, and was born after said Blythe's return to said city and county of San Francisco; that said Thomas H. Blythe never was married, and had no family except said plaintiff, Florence Blythe; that during the pregnancy of said Julia Perry, and prior to the birth of said plaintiff, said Thomas H. Blythe provided funds to support and care for her at and after the delivery of said child, the plaintiff herein, and during said pregnancy; and at the city of London, England, to the mother of said Julia Perry, and in the presence and with the consent of said
21 Julia Perry, he did publicly acknowledge himself to be the father of said child, then unborn, and did promise to support and maintain said child, and did designate in writing the name by which said child should be called, to wit: "Vernon Wilmot if a boy, and Flora if a girl," and did subscribe his name thereto, and also his place of residence, to wit: San Francisco, California; that after the birth of plaintiff, to wit: on or about the 31st day of July, 1881, plaintiff was, at the special instance and request of said Thomas H. Blythe, baptized and christened by the name of Florence Blythe; that after the birth of said plaintiff, and thence continuously until his death, having no family except as aforesaid, he did, in the State of California, to his acquaintances, friends, associates and other persons, publicly acknowledge and declare plaintiff to be his own child and daughter, and did support, maintain and educate plaintiff as his child, and did otherwise treat her as if she were his legitimate child, and did receive her into his said family.

XI.

Said Thomas H. Blythe was never married to the defendant herein, styling herself in her answer herein as and by the name of Alice Edith Blythe, widow of said Thomas H. Blythe, deceased, but said Alice Edith, from about the year 1880 up to the time of his death, did cohabit with said Thomas H. Blythe, deceased, as his mistress, and in no other character or capacity; and she, said Alice Edith, during all of said period of time last mentioned, well
22 knew of the plaintiff herein as well as all the facts touching or concerning the birth of plaintiff; and that after the birth of plaintiff said Thomas H. Blythe, deceased, did, in the State of California, publicly, as aforesaid, acknowledge and declare said plaintiff to be his own child and daughter, and did support, maintain and educate plaintiff as if she were his legitimate child, and did receive her into his family as aforesaid, all of which the said Alice Edith did consent to, approve of, and acquiesce in during the life of said Thomas H. Blythe, deceased, and the said Alice Edith and the said Thomas H. Blythe accepted, recognized and received the plaintiff as his, the said Thomas H. Blythe's own child and daughter.

XII.

At the time of the birth of plaintiff as aforesaid, and prior thereto, and thence continuously up to the time of his death, said Thomas H. Blythe was sane, and of sound and disposing mind and memory, and mentally competent to adopt plaintiff under the provisions of section 230 of the Civil Code of the State of California, as well as in any other manner known to the law, and mentally competent to institute her his heir under the provisions of section 1387 of said Civil Code of the State of California, and mentally competent to do and perform all acts and things necessary or proper in order to effectuate such adoption and institution according to law, and was at all times mentally competent to bequeath or devise his estate or change the descent thereof; and at the time of the birth of plaintiff, and prior thereto, and thence continuously until his death,
23 said Thomas H. Blythe was, and continued to be, free from undue influence, or any influence, exercised over him by any person or persons whomsoever, and there were not at any time any false or fraudulent representations made to him regarding the paternity of said plaintiff, Florence Blythe, by said Julia Perry, afterwards Julia Ashcroft, nor by said James Crisp Perry, nor by Mrs. Kate Crisp Perry, the wife of said James Crisp Perry, formerly Miss Kate Beadle, nor by plaintiff, nor by any other person or persons; and each and all of the statements made to the said Thomas H. Blythe, deceased, by said last-named persons, and every of them, concerning or relating to the paternity of said plaintiff, were, and every of them was, true; and said Thomas H. Blythe was sane, and of sound mind and disposing memory, and free from any and all undue influence, fraud or misrepresentation in doing and performing all and singular the acts and things by him done or performed in or about adopting said Florence Blythe as his lawful child and heir, and the adoption of said Florence Blythe by said Thomas H. Blythe, deceased, was free from all fraud or misrepresentation, and the same was knowingly, understandingly and intelligently made by said Thomas H. Blythe, deceased.

XIII.

Said Thomas H. Blythe, in his lifetime, at the city and county of San Francisco, State of California, on or about the 25th day of February, A. D. 1883, made, executed, signed and subscribed a
24 certain instrument in writing, in the presence of W. H. H. Hart, who was then and there a competent witness, and who then and there, in the presence and at the request of said Blythe, signed his name to said instrument as a witness thereto; but said Hart was then and there the attorney and legal adviser of said Blythe, and by reason thereof, and of the provisions of section 1881 of the Code of Civil Procedure of the State of California, the court permitted said Hart to prove the execution of said instrument, and the execution of said instrument was so proved; but did not permit said Hart to testify as to the contents of said instrument, the original of which instrument was lost and destroyed, and

could not be produced in court; but what plaintiff claimed to be a copy thereof was in the words and figures following, to wit:

"Know all men by these presents that whereas I, the undersigned, Thomas H. Blythe, am the father of Florence Blythe, a little girl nine years of age last December, who now resides with her grandfather, James C. Perry, of Manchester, England;

"And whereas, I am not married and have no family but myself and said daughter; and whereas, some question may hereafter arise, in case of my death, as to whether or not my daughter, the said Florence Blythe, is legitimate; and whereas, I desire my said daughter, Florence, to inherit my property; and for that purpose, and to forever settle the question of her legitimacy, I do hereby make, sign, and accept this document in the presence of a competent witness for that purpose; and I hereby certify and de-
25 clare that the said Florence Blythe is my daughter and child, and the issue of my body, and that I have always publicly acknowledged her as such, and supported and treated her as legitimate; and I now declare and acknowledge myself to be the father of said Florence Blythe, and declare her to be my daughter and child, and this instrument and writing is made for the purpose of making her legitimate beyond question, and for the purpose of making her the heir of my person and body, that she may, and shall, inherit my property.

"(Signed) THOS. H. BLYTHE.

"Witness:

"W. H. H. HART."

Which copy thereof, as well as the contents of said instrument, plaintiff offered to prove by said Hart was the instrument and the correct copy thereof, executed as aforesaid; but the court would not permit such proof, upon the ground that said Hart was the attorney and legal adviser of said Blythe at the time and in the manner aforesaid,—to which ruling of the court plaintiff then and there duly excepted.

XIV.

On the 15th day of June, A. D. 1881, said Thomas H. Blythe, deceased, signed and subscribed in said city and county of San Francisco, and in the presence of W. H. H. Hart, a writing in the form of a letter, which said letter was addressed to James Crisp Perry, Manchester, England, and the said Thomas H. Blythe then and there read the said letter to the said W. H. H. Hart, and the
26 same was in due course of mail received by said Perry, which writing was in the words and figures following, to wit:

"San Francisco, *June* 15, 1881.

"My Dear Mr. Perry: The Graphic received with thanks, which reminds me of a duty unfulfilled. It is not easy to explain in a letter the real why of this delay, and particularly when the question of dear Flora's christening was involved. The postponement

seems to run from day to day, thinking the following morrow would bring more time and strength. I look at the proposed baptism of dear Flora as a matter of very deep importance. After a full deliberation I think it best to have Flora brought up in the Episcopal church—Church of England. You will therefore please have my daughter christened at once, and have her named after her father, Florence Blythe. Although myself a skeptic as to orthodox Christianity, yet I believe in one Supreme, and that man mentally is a tribune made up of moral, intellect, and religious elements. The non-action of either of these factors, and the human becomes inhuman. Probably the words devotional deism will approximately express my religious views. If my child had been with me I should most likely have brought her up in my own faith, but, as things stand, I shall be perfectly satisfied to have her brought up in the old Christian faith as taught in the Church of England, with its sublime devotional service. Neither do I wish that her tender mind shall be troubled by any doubts on the question of faith—let her hope be full, calm, unclouded and serene. Faith in the
27 hereafter, no matter how arrived at, is a condition necessary to the right solution of the problem of being. The other photo. I long ago promised shall be sent by this mail. I owe you many apologies for this delay. My health is now better than it has been for some time. With my best love and great many kisses to my dear little Flora, and very best wishes for yourself and Mrs. Perry, and hoping you are all well,

"Very truly yours, THOS. H. BLYTHE."

Said James Crisp Perry, to whom said letter was so addressed, and by whom the same was so received as aforesaid, was the grandfather of said plaintiff, and is guardian herein of said plaintiff, and said plaintiff was then living with him, said Perry, in said city of Manchester, England. Said W. H. H. Hart saw said Blythe sign said letter, but he was not by said Blythe called upon to witness the writing or signing of the same, and said Hart did not attest the same as a subscribing witness thereto.

XV.

On the 21st of October, A. D. 1881, said Thomas H. Blythe, deceased, signed and subscribed, in said city and county of San Francisco, and in the presence of W. H. H. Hart, a writing in the form of a letter, which said letter was addressed to the plaintiff at Manchester, England, and the same was, in due course of mail, received by said plaintiff, which said writing was in the words and figures following, to wit:

28 "SAN FRANCISCO, *Oct.* 21, 1881.

"MY DARLING CHILD: You have made your father very happy by writing to him your dear little letter. I have read it over and over often, and find it very well written for a little girl, and very glad to find you have made so much progress. But I feel very sad

to learn that my own dear child has been so sick with the whooping cough, and her papa not being near to comfort and help her. But your grandpa and grandma are so good; and that is a great comfort to me, for they have done and will do all that can be done for their dear little grandchild. You say you 'wonder when you shall see your dear papa?' Well, my dear child, it is about like this: Your papa for the last few years has had a great many things to attend to, and almost every evening, on leaving his office, he is very much tired with too much thinking about business and things, but he hopes to be able to sell off and get clear of most of these business works very soon; and when he does he will come to Manchester to see his dear child, and her grandpa and grandma. After that your papa will leave San Francisco for good and go to live on a large farm on the Colorado river, near the head of the gulf of Cortez, in Mexico, and have dear Florence with him always. When we get there we shall have plenty of horses and cattle and chickens and doves and ducks and turkeys and all kinds of birds; and I shall take all my dogs there too; and take my great big St. Bernard dog named 'General Grant,' and I know when you see
29 'General Grant' you will like him so and he will love you so much. I tried to write you this letter in the day, but so many people coming in all the time I have to give it up, and I came down to the office this evening so as not to make more delay. 'General Grant'—I call him 'Grant'—sleeps in my private office at night, and he is now laying at my feet, while his master is writing his first letter to his own darling child far away. People say that 'Grant' is the handsomest dog on this coast. One word more: I should like my dear daughter to write to her papa a letter once every month. It need not be a long letter, but just a little letter to tell me what you have done during the month and what progress you make, particularly in your music. I am very fond of music although I do not play myself; and you can also tell me about the health of your dear grandpa and your dear grandma, and other things besides. May God bless you, my dear child.

"From your loving father,

"THOMAS H. BLYTHE."

Said W. H. H. Hart saw the said Thomas H. Blythe sign said letter, but he was not by said Blythe called upon to witness the writing or signing of the same, and said Hart did not attest the same as a subscribing witness thereto.

XVI.

On the 16th day of May, 1882, said Thomas H. Blythe, deceased, signed and subscribed in said city and county of San Fran-
30 cisco, and in the presence of W. H. H. Hart, a writing in the form of a letter, which said letter was addressed to the plaintiff at Manchester, England, and the same was, in due course of mail, received by said plaintiff, which writing was in the words and figures following, to wit:

"SAN FRANCISCO, *May 16th*, 1882.

"MY OWN DARLING CHILD: There is an unfinished letter for you in the safe at papa's office, written about three weeks ago, which would have been mailed to you the morning after it was written, had not the doctor ordered papa to bed that very same evening. The doctor said this morning that I can be out in three days. All the trouble was simply a slight attack of gout in the left foot. Will write again in three or four days. I am now writing this in bed, but papa was afraid his dear child might feel uneasy at the long delay, so he thought it best to drop a few lines at once. Really, the rest in bed will be beneficial to me, and I am sure when I get out of bed I will be in better health than I have been for some time. Give my very best wishes to grandpa and grandma, and say that papa hopes grandpa is now entirely recovered from his late serious illness. Hoping that your health is good,

"From your loving papa,

"THOS. H. BLYTHE,
"*No. 6 O'Farrell Street.*

"To Florence Blythe."

Said W. H. H. Hart saw said Thomas H. Blythe sign said letter, but said Hart was not by said Blythe called upon to witness
31 the writing or signing of the same, and said Hart did not attest the same as a subscribing witness thereto.

XVII.

On the 3d day of April, A. D. 1883, said Thomas H. Blythe, deceased, signed and subscribed, in said city and county of San Francisco, and in the presence of said W. H. H. Hart, a writing in the form of a letter, which said letter was addressed to plaintiff at Manchester, England, and the same was, in due course of mail, received by said plaintiff, which writing was in the words and figures following, to wit:

"SAN FRANCISCO, CAL., *April 3*, 1883.

"To Florence Blythe.

"MY DEAR CHILD: Papa returned to San Francisco ten days ago, in excellent good health. I felt a little disappointed in not finding a letter from darling Florence on my return here. Papa, you know, is very anxious about his darling little child's health. I hope soon to hear that your health is better. After a little business matter is arranged here, I shall return to the Colorado river again, and shall remain there, this time, about six weeks or thereabouts. Give papa's kindest regards to your grandpa and grandma, with the earnest hope that they are in good health. With papa's love to his darling child.

"THOMAS H. BLYTHE."

Said W. H. H. Hart saw said Thomas H. Blythe sign said letter, but said Hart was not by said Thomas H. Blythe called upon to witness the writing or signing of the same, and said Hart
32 did not attest the same as a subscribing witness thereto.

XVIII.

The defendants, Elizabeth Powell, Sarah Roberts, John Barnes, Joseph Barnes, Sarah Foulkes, Thomas Hughes, Sarah Ann Hughes, John Williams, Charles Williams, Thomas Williams, Edward Williams, Mary Platt, Margaret Williams, Margaret Williams, widow of Ebenezer Williams, deceased, Ann Ruth Williams, John Charles Williams and Margaret May Williams, were, and each of them is, related to Thomas H. Blythe, deceased, as in their answer to the second amended complaint of the plaintiff as amended herein is alleged, to which answer reference is hereby made for the purpose of specification of their respective relationship to said Thomas H. Blythe, deceased, but none of these last-named persons was ever in the State of California during the lifetime of said Thomas H. Blythe, deceased. Nor did said Thomas H. Blythe, from August, 1873, down to the time of his death, ever see said persons, or any of them, nor did he during said period correspond or communicate in any way with them, or any of them.

XIX.

That the law of this State, as embodied in sections 230 and 1387 of the Civil Code thereof, is not and never has been the law in said United Kingdom of Great Britain and Ireland, nor has there ever been in said United Kingdom any law of adoption, or any
33 law by which an illegitimate child could by an acknowledgment in writing, or otherwise, be instituted as or become the heir of a person, or any law by which an illegitimate child could be adopted as the child or heir of its putative father.

XX.

That none of the defendants herein other than those named and enumerated in finding number XVIII was, nor is any of them, in anywise related to or in any manner akin to said Thomas H. Blythe, deceased.

XXII.

As conclusion of law the court finds:

That the plaintiff, Florence Blythe, was and is the child of Thomas H. Blythe, deceased; that said Thomas H. Blythe, deceased, legally adopted her; that she is his lawful heir, and the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased, which estate is particularly described in paragraph IX of the original and amended complaint herein, and reference is hereby made to said paragraph IX for full and particular description thereof.

And the court finds that said plaintiff is entitled to her costs.

Dated this 22d day of October, 1890.

J. V. COFFEY, *Judge.*

(Endorsed:) Filed October 22, 1890. Wm. A. Davies, clerk, by E. J. Casey, deputy clerk.

34 Recorded, Minute Book 113, page 327.

That said judgment, so duly given, made and entered as aforesaid, was, and is, in words and figures following, to wit:

"In the Superior Court of the State of California in and for the City and County of San Francisco.

"In the Matter of the Estate of THOMAS H. BLYTHE, Deceased; Florence Blythe, a Minor, by James Crisp Perry, the Guardian of Her Person and Estate, Plaintiff, *vs.* "ABBIE AYRES *et al.*, Defendants. } No. 2401.

"*Decree.*

"The above-entitled cause of Florence Blythe, a minor, by James Crisp Perry, the guardian of her person and estate, plaintiff, *vs.* Abbie Ayres *et al.*, defendants, having heretofore been regularly tried and submitted to the court for a decision, and the court having maturely considered all and singular the facts and the law in the premises, and made and filed its findings of fact and conclusions of law therein, upon consideration duly had in the premises, the court does here now

"Adjudge and decree that said Florence Blythe was and is the child and daughter of said Thomas H. Blythe, deceased; that said Thomas H. Blythe, deceased, legally adopted her as his
35 lawful child and heir; that she, said Florence Blythe, is the sole owner of all the estate of said Thomas H. Blythe, deceased, of every name, nature and description, wherever situate, and that she is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased.

"And it is further adjudged and decreed that all the defendants in said action, and all persons known or unknown, other than said plaintiff, Florence Blythe, are not, nor is any of them, entitled to distribution in whole, or in part, of any of the estate of said Thomas H. Blythe, deceased; nor are they, or any of them, heirs, or any heir, of said Thomas H. Blythe, deceased; nor have they, or any of them, any ownership of, or interest in, any of the estate of said Thomas H. Blythe, deceased.

"And it is further adjudged and decreed that said Thomas H. Blythe, deceased, died seized, possessed and owner of all and singular the lands and premises and real property and interests therein, and property hereinafter particularly described, and the same constitute the estate of Thomas H. Blythe, deceased, as far as known.

"The lands, premises and real property and interests therein, and property hereinbefore referred to and constituting the real property of said Thomas H. Blythe, deceased, as far as known, is

particularly described as follows, to wit:" * * * (Then
36 follows a description of the lands and property belonging to this estate.)

"It is further adjudged and decreed that said plaintiff recover her costs herein, taxed at the sum of ——.

"Done in open court this October 22nd, A. D. 1890.

"J. V. COFFEY, *Judge.*"

(Endorsed:) Filed Oct. 22, 1890. Wm. A. Davies, clerk, by E. J. Casey, deputy clerk.

Recorded in Minute Book 113, page 342.

Your petitioner alleges that your petitioner is the person who is mentioned in said judgment under the name of Florence Blythe; that on the 21st day of September, 1892, your petitioner was married to Frederick W. Hinckley.

That the said judgment still remains in full force and effect, and has not been in anywise reversed, vacated or annulled; that certain of the aforesaid parties who appeared as above stated in said cause, and who appeared upon the trial of said cause as above stated, appealed from sai- judgment to the supreme court of said State of California, and prosecuted their appeals in said supreme court; that said appeals have all been heard by said supreme court, and that judgment has been duly given and made by said supreme court in the case of each of said appeals, after hearing each of said appeals, affirming said judgment of said superior court, and that in the case of each of said appeals a remittitur has been issued from said
37 supreme court to, and filed in, said superior court, stating the affirmance by said supreme court of said judgment of said superior court; that the names of the parties by whom said appeals were thus taken and prosecuted, and the dates upon which judgment was given and made as aforesaid by said supreme court on each of said appeals, affirming the aforesaid judgment of said superior court, are as follows, to wit:

That one of said appeals was taken by the aforesaid Elizabeth Powell, Sarah Roberts, John Barnes, Joseph Barnes, Sarah Foulkes, Thomas Hughes, Sarah Ann Hughes, John Williams, Charles Williams, Thomas Williams, Edward Williams, Mary Platt, Margaret Williams, and Margaret Williams, widow of Ebenezer Williams, deceased, Ann Ruth Williams, John Charles Williams, and Margaret May Williams, being case No. 14938 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 30th day of November, 1892, affirming said judgment of said superior court;

That one of said appeals was taken by Henry T. Blythe, Joseph A. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Penola E. Newport, Charles Blythe, Senior, Charles Blythe, Junior, Ellen Blythe, Esther Douglas, Elizabeth Shelton, Ellen Rutherford, and William S. Blythe, being case No. 15472 in said supreme court; that the judgment of the supreme court on said appeal was given

and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by Alfred Savage,
38 Mary Ann Standen, John Savage, Frederick Savage, Henry C. Savage, Eliza Ann Percival, Johanna Hall, and William Yetton, being case No. 15532 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by William Savage and David Savage, being case No. 15437 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by the Blythe Company, being case No. 15411 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by James Witt Pearce, being case No. 15433 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court; and

That one of said appeals was taken by Alice Edith Blythe, being case No. 15479 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That the said Thomas H. Blythe died intestate, in the city
39 and county of San Francisco, on the 4th day of April, A. D. 1883; that he died unmarried, and left no widow surviving him;

That he left him surviving your petitioner, who was and is the only child and daughter of said Thomas H. Blythe, deceased; that said Thomas H. Blythe, deceased, legally adopted your petitioner as his lawful child and heir; that your petitioner is the sole owner of all of the estate of said Thomas H. Blythe, deceased, of every name, nature and description, wherever situate, and that your petitioner is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased;

That the real estate hereinabove, and in the judgment hereinabove set forth, described, is a part of the estate of said Thomas H. Blythe, deceased; and there also belongs to said estate money which has been received by the administrator thereof from rents of the property of said estate, amounting to more than one hundred and sixty thousand ($160,000) dollars, of all of which real estate and money, as well as of any other property which belongs to the estate of said Thomas H. Blythe, deceased, your petitioner is entitled to

have and receive distribution, as the only heir of said Thomas H. Blythe, deceased;

That more than 11 years have elapsed since letters of administration were issued by the superior court of said city and county upon the estate of said Thomas H. Blythe, deceased; that said estate is but little indebted, and the share of said estate to which your petitioner is entitled, as aforesaid, may be immediately allowed to her without loss to the creditors or to any creditor of said estate; and your petitioner hereby offers to give bonds, with security, as provided by law in such case, for the payment of the debts of the said estate.

Wherefore, your petitioner prays, that after due notice given and proceedings had, that the said superior court make an order distributing to your petitioner the share of the said estate of Thomas H. Blythe, deceased, to which she is entitled, to wit: all the property and funds belonging to the said estate, except what may be sufficient to pay the costs and expenses of administration remaining unpaid, upon your petitioner giving bonds, with security, to the administrator of said estate, conditioned for the payment whenever required of her proportion of the debts due from said estate, to wit: the whole of the debts, if any, due from said estate, not exceeding the value or amount of the portion of said estate to which she is entitled; the sureties to said bond to be approved by the judge of said superior court; and your petitioner asks for such other and further order and relief in the premises as may be just, and to the court seem meet; and your petitioner will ever pray, etc.

FLORENCE BLYTHE HINCKLEY, *Petitioner.*

WM. H. H. HART,
Attorney for Petitioner.
GARBER, BOALT & BISHOP AND
W. W. FOOTE, *Of Counsel.*"

These claimants, Henry T. Blythe *et al.*, in due time, to wit: on July 25, 1894, filed and served their verified answer to said petition for distribution, of which answer (omitting the verification) the following is a copy:

(Title of Court and Estate as Last Above.)

Answer.

Now comes Henry Thomas Blythe, Joseph A. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Mrs. Penola E. Newport, (*née* Blythe,) Charles Blythe, Sr., Ellen Blythe, Esther Douglas, (*nee* Blythe,) William S. Blythe, Ellen Rutherford and Charles Blythe, Jr., claimants of said estate, and answering the petition for distribution of Florence Blythe Hinckley, filed herein June 18, 1894, asking that said estate be distributed to her, allege and deny as follows:

Said petitioner, Florence Blythe Hinckley, ought not to have the relief prayed for in her petition or any relief, for this, namely: that

the said action or proceeding filed in this estate entitled Florence Blythe *vs.* Abbie Ayres *et al.*, mentioned in her petition, is still pending.

These defendants and claimants deny that on October 22d, 1890, or at any other time, or ever the said court entered its judgment in said matter of Florence Blythe *vs.* Abbie Ayres *et al.*, and deny that said judgment was ever duly given and made therein; on the contrary, these defendants and claimants aver that no judgment has ever been entered therein. And these defendants and claimants deny that the alleged judgment set out in said petition was
42 ever entered; but on the contrary, they aver that it was never entered in any judgment book of the superior court of the city and county of San Francisco, State of California. And these defendants and claimants deny that the "decree" set out in said petition was the judgment, or any judgment, in said action or proceeding; they deny that said or any judgment still remains in full force and effect; and they deny that it ever was in any force or effect as a judgment.

They allege that the so-called judgment set out in said petition is not a final judgment, and never was a final judgment.

That the right to appeal therefrom never has matured or accrued to these defendants and claimants; and the time for appeal therefrom has never arrived. That the alleged appeals taken therefrom to the supreme court were premature and futile, and the alleged affirmance of said judgment by the supreme court was without jurisdiction, ineffective and void.

And these defendants and claimants of said estate, further answering the matters of said petition of Florence Blythe Hinckley, upon their information and belief, deny as follows:

They deny that said petitioner was or is the child or daughter of Thomas H. Blythe, deceased, or that she was or is any relation or kin to him;

They deny that said decedent ever adopted said petitioner as his lawful child or heir, or as his child or heir, or in any manner at all;

They deny that she is the sole owner or any owner of all or any of the estate of said decedent;
43 They deny that she was or is the lawful heir, or any heir, or heir at all of said decedent, or that she is or ever was entitled to have or receive distribution of said estate or any part thereof.

And these defendants and claimants allege that they are the heirs and next of kin of said Thomas H. Blythe, deceased, and are entitled to said estate upon distribution.

And these defendants and claimants further allege that one Alice Edith Blythe was and is a claimant of said estate, and a defendant in said proceeding of Florence Blythe *vs.* Abbie Ayres *et al.*, aforesaid, and the said Alice Edith Blythe appealed to the supreme court of this State, from an order of the superior court denying her motion for a new trial therein, which appeal has never been decided

by, or submitted to, or argued before said supreme court, but is still pending therein.

Wherefore, these defendants and claimants of said estate pray that the prayer of the petition for distribution to her, filed by said Florence Blythe Hinckley, be denied, and that her said petition be dismissed.

Respectfully, S. W. & E. B. HOLLADAY,
Att'ys for Henry T. Blythe et al., Defendants and Claimants.

Duly verified and served on petitioner; and

(Endorsed:) Filed July 25, 1894.

Pursuant to citation and notice duly given and served, said petition for distribution came on regularly for hearing before said court, when W. H. H. Hart, Esq., attorney for said petitioner,
44 and various associate counsel with him, appeared for said petitioner, and S. W. and E. B. Holladay, Esqs., appeared as attorneys for Henry T. Blythe *et al.*, resisting said application.

And in support of said application said Florence Blythe Hinckley put in evidence the following papers, matters, proofs and proceedings, viz:

That said decedent, Thomas Henry Blythe, died intestate at said city and county of San Francisco, April 4th, 1883, leaving estate real and personal in said city and county;

That he was at the time of his death, a citizen of the United States, and a resident of said city and county;

That an administrator on his said estate was duly and regularly appointed by said court, and qualified June 12, 1883, and letters of administration were thereupon duly issued to him, and said estate ever since that date has been and still is in the charge of a lawful administrator thereof, and is in due course of settlement.

That due notice to creditors to present their claims against said estate had been given as required by law, and a decree had been duly made and entered in the matter of said estate, establishing the due giving of said notice to creditors; and the time for all persons having claims against said estate to present the same to the administrator thereof had expired long prior to the filing of the said petition for distribution; and that said estate was but little indebted.

That after the expiration of one year from the issuing of letters of administration upon said estate, to wit: October 1st, 1885, said Florence Blythe filed her petition in the matter of said estate,
45 claiming to be the daughter and sole heir-at-law of said decedent, and so entitled by succession to the whole of said estate, and praying said court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made, all in accordance with the provisions of section 1664 of the Code of Civil Procedure of this State, as is more particularly stated in her petition for distribution aforesaid; whereupon said court, by its order duly given and made, fixed February 1st, 1886, for the appearance of all parties claiming

any interest in said estate, and ordering service of notice thereof, as alleged in said petition for distribution, which notice was duly served; and thereupon said court acquired jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased; and that thereafter the said court entered an order in the matter of said estate, establishing proof of the service of said notice.

That thereafter, and within the time fixed by said notice, various persons filed their written appearances through their attorneys in said proceeding, which appearances were duly entered in the minutes of the court, and in the register of the proceedings of said estate; and that thereafter, and after the expiration of the time limited for appearing as aforesaid in said proceeding, the said court entered an order in said proceeding, adjudging the default of all persons for not appearing as required by said section, who had failed so to appear therein.

46 Thereupon, within twenty days after the date of the said order or decree establishing proof of the service of said notice, to wit: February 25th, 1886, the said Florence Blythe filed her complaint in the matter of the said estate of Thomas H. Blythe, deceased, and served a copy of the same upon each of the parties or attorneys who had entered their written appearances as aforesaid; which was afterwards superseded by her second amended complaint, duly verified, served and filed April 26, 1887, which set forth, with reasonable particularity, the facts constituting her claim of heirship, ownership and interest in said estate, which was served upon each of the parties or attorneys who had entered their written appearances as aforesaid.

To said second amended complaint these claimants, Henry T. Blythe *et al.*, named as defendants therein, duly served upon the plaintiff and filed their verified answer and cross-complaint, in which they made special traverse to the allegations of said second amended complaint, and then set forth the facts constituting their claim of heirship, ownership and interest in said estate. To which answer and cross-complaint said plaintiff duly served and filed her verified answer, making special traverse to the allegations of the facts by said Henry T. Blythe *et al.*, set forth as constituting their claim of heirship, ownership and interest in said estate. Afterwards, on September 11, 1889, said plaintiff, Florence Blythe, served and filed her verified amendments to her said second amended complaint.

47 Afterwards, these claimants, Henry T. Blythe *et al.*, defendants therein, served and filed their answer to plaintiff's said amendments aforesaid, in which answer they made special traverse of each averment in said amendments contained.

Thereafter, the defaults of all persons not appearing, and of all parties failing to plead, having been duly entered as aforesaid, said action or proceeding (Blythe *vs.* Ayres) came on regularly for trial on the 15th day of July, 1889, before the court, a jury having been waived; and the various parties produced evidence, oral and docu-

mentary, tending to prove the allegations of their respective pleadings:

And the cause having been regularly tried and submitted to said court for decision, afterwards, to wit: on October 22d, 1890, the court duly made and gave and filed its decision in writing, being its findings of fact and conclusions of law therein, which decision is set out in the petition for distribution, aforesaid, of Florence Blythe Hinckley; and on said 22d day of October, 1890, said court signed and filed a writing, entitled and endorsed "decree," a copy of which is set out in the petition for distribution, aforesaid of Florence Blythe Hinckley.

On the 22d day of October, 1890, the clerk of said court entered said findings of fact and conclusions of law, or decision, in Minute Book 113, at pages 327 to 340, inclusive; and never in any other book; said entry beginning with the word "findings," down to the end thereof, including the signature of the judge; and being made in said minute book only under the following caption and not otherwise, to wit:

48 "In the Matter of the Estate of THOMAS H. BLYTHE, Deceased. 2401.

"Proposed amendments filed. Petition of E. R. Taylor for attorneys' fees filed. Findings of fact, etc., filed—page 342.

"*Findings.*

"This cause having been regularly called for trial," &c. (down to the close of said findings as set out in said petition for distribution).

On the 22d day of October, 1890, the clerk of said court entered said writing denominated and endorsed "decree," in Minute Book 113, beginning at page 342, and never in any other book; said entry being as follows and under the following heading and title, and not otherwise:

"In the Matter of the Estate of THOS. H. BLYTHE, Deceased.

"Decree made and filed.

"*Decree.*

"The above-entitled cause of Florence Blythe, a minor, by James Crisp Perry, the guardian of her person and estate, plaintiff, *vs.* Abbie Ayres *et al.*, defendants, having heretofore been regularly tried and submitted," &c., (down to the close thereof, as set out in said petition for distribution).

It appeared that said entry of said findings of fact and conclusions of law and of said decree, was made in Minute Book 113 of said superior court, and that the said Minute Book 113 in
49 which said findings of fact and conclusions of law were so entered, is one of a series of minute books of said superior court, numbered from 1 to 173 inclusive, in which all orders and

decrees in probate matters and proceedings are entered at length, and which said books are kept for the purpose of entering therein all orders and decrees in probate matters and proceedings, in accordance with the provisions of section 1704 of the Code of Civil Procedure.

The papers in said action or proceeding were not, nor were any of the papers therein attached together by the clerk, or filed in the form of a judgment-roll; nor marked as the judgment-roll; nor was there any docket entry of said judgment made in the judgment docket.

When, upon the hearing of said petition for distribution, the petitioner, Florence Blythe Hinckley, offered in evidence said findings or decision, and said decree, and said entries in said Minute Book 113, all dated October 22, 1890, these claimants, Henry T. Blythe, *et al.*, by their said attorneys, S. W. & E. B. Holladay, objected to the same and to each one thereof, upon the following grounds, namely:

1st. That the same were incompetent, irrelevant and immaterial as evidence to support petitioner's claim to distribution of this estate, or to prove said petitioner's right or title to the property of said estate or any part thereof.

2nd. That said alleged decree is not a judgment nor a final determination of the rights of the parties in said action or proceeding of Blythe *vs.* Ayres, *et al.*, and is of no legal consequence.

50 3rd. That no judgment was ever entered in Blythe *vs.* Ayres, *et al.*

4th. That the action or proceeding of Florence Blythe *vs.* Abbie Ayres, *et al.*, is still pending, the time for appeal not having passed; no judgment therein having been entered.

Which objections and each of them were then and there overruled, and said evidence was admitted; to which ruling these claimants, Henry T. Blythe, *et al.*, duly excepted, and the same is hereby specified as—

Exception No. 1.

Said petitioner, Florence Blythe Hinckley, next offered in evidence the notice of appeal of these claimants, Henry T. Blythe, *et al.*, dated, served and filed December 20, 1890, entitled in said estate and proceeding, and giving notice to plaintiff, Florence Blythe, and her attorneys, that they did thereby "appeal to the supreme court of this State of California from the judgment therein made and entered on the 22nd day of October, 1890, in favor of the said plaintiff, Florence Blythe, and against the said Henry T. Blythe, *et al.*, and from the whole of said judgment."

And said petitioner also proved that an undertaking on appeal, in due form and time, in the sum of $300, was filed with said notice of appeal.

Said petitioner also offered in evidence from the clerk's office of the supreme court, the transcript of said Henry T. Blythe, *et al.*, upon their appeal from said judgment made and so entered October 22, 1890, numbered 15472, and entitled:

51 "Estate of THOMAS H. BLYTHE, Deceased; FLORENCE BLYTHE, Respondent,
vs.
"ABBIE AYRES *et al.*

"*Transcript on Appeal from the Judgment by Henry T. Blythe et al.*"

Which transcript contained the second amended complaint of Florence Blythe; the amended answer thereto and cross-complaint of Henry T. Blythe *et al.*; the plaintiff's answer to said cross-complaint; plaintiff's amendments to said second amended complaint; said defendants' answer thereto; the findings or decisions thereon; the writing denominated a "decree;" and the notice of appeal of Henry T. Blythe, *et al.*,—being the pleadings and papers heretofore in this bill set out.

And plaintiff particularly offered in evidence certain printed words following the name "J. V. Coffey, judge," at the end of the so-called decree, to wit:

"(Duly recorded and entered up.)
"(Endorsed:) Filed Oct. 22, 1890.
"Recorded M. B. 113, p. 342."

And also a stipulation signed by said S. W. & E. B. Holladay, as attorneys for Henry T. Blythe, *et al.*, attached to said transcript, in the following words:

"It is hereby certified that the foregoing transcript on appeal in this case is correct, consisting of true and correct copies of—

1. Plaintiff's second amended complaint.
2. Said defendants' answer thereto, and cross-complaint.
52 3. Plaintiff's answer to said cross-complaint.
4. Plaintiff's amendments to said second amended complaint.
5. Said defendants' answer thereto.
6. The findings or decision thereon.
7. The decree or judgment thereon.
8. These defendants' notice of appeal from said judgment, with proof of service thereon.
9. The date of filing on each of said papers.
10. That an undertaking on this appeal, in due form, has been properly filed herein by said defendants and claimants, Henry T. Blythe *et al.*

It is further stipulated and agreed that all the pleadings and orders contained in the transcript and supplemental transcripts, now on file in the supreme court of the State of California, in the matter of the Williams appeal, so called, from the judgment and decree rendered in the above-entitled matter and proceeding known as cause No. 14938, in said supreme court, may be referred to, and may be considered for all the purposes of this appeal of the defendants and claimants, Henry T. Blythe *et al.*, a part of the judgment-roll in said cause and proceeding, to the same extent as if such

pleadings and orders had been set forth in the foregoing transcript; and the same are hereby made a part of this transcript on appeal

Dated, this 17th day of August, 1893.

WM. H. H. HART &
THOS. I. BERGIN,
Attorneys for Plaintiff and Respondent.

53 S. W. & E. B. HOLLADAY,
Attorneys for Henry T. Blythe et al., Defendants, Claimants and Appellants."

Said petitioner also offered in evidence the remittitur from the supreme court of the State of California, in said cause No. 15472, certifying that upon said appeal the judgment so appealed from was affirmed, which remittitur was filed in this court May 25, 1894.

Said petitioner also offered in evidence the order of the superior court, dated and signed by the Hon. J. V. Coffey, judge, and filed May 26th, 1894, of which order the following is a copy:

"FLORENCE BLYTHE, etc., Plaintiff,
vs.
"ABBIE AYRES *et al.*, Defendants.

"It appearing to the court that there was this day filed in this court in the above-entitled action and proceeding a certificate and remittitur from the supreme court of the State of California, in the words and figures following:"

(Then follows a copy of said remittitur.)

"And it appearing to the court that the judgment in favor of Florence Blythe, plaintiff, against Abbie Ayres *et al.*, defendants, was affirmed upon the appeal of H. T. Blythe *et al.*, from the judgment, and good cause appearing therefor:

"It is, on motion of W. H. H. Hart, Esq., attorney for plaintiff, ordered that the clerk of this court attach said certificate and remittitur to the judgment-roll in this cause, and enter a minute

54 of the judgment of affirmance of the supreme court on the docket against the original entry of the judgment and decree heretofore entered in this cause, and in favor of said Florence Blythe, and against said Abbie Ayres *et al.*, defendants.

"J. V. COFFEY, *Judge.*

"May 25, 1894.

"(Endorsed:) Filed May 25, 1894. M. C. Haley, clerk, by J. B. Sherrard, deputy clerk."

And also offered in evidence Minute Book 156, page 522, containing the record of said order. It appeared that at the time said remittitur was introduced in evidence it was not attached to any judgment-roll.

When the foregoing papers and matters, to wit: the notice of appeal, the transcript on appeal, the alleged recital therein as to the decree being "duly recorded and entered up," the alleged stipula-

tion therein as to "the decree or judgment thereon," the remittitur from the supreme court and the order on said remittitur, each and severally were offered in evidence, these claimants, Henry T. Blythe *et al.*, objected to the reception or use of the same in evidence, and to each one thereof, upon the following grounds, *i. e.*: as being incompetent, irrelevant, and immaterial under any of the issues; that as no judgment was ever entered in any judgment book, therefore the matter and proceeding of Blythe *vs.* Ayres *et al.*, was and is still pending; that no right to appeal from the or any judgment had ever accrued to these defendants therein, Henry T. Blythe *et al.*;
55 that the said notice of appeal was futile, and of no legal consequence; that the giving of a bond did not perfect said appeal, because no right of appeal could lie or be then perfected; that the said superior court did not, by said appeal, lose jurisdiction of said matter, and said supreme court never acquired jurisdiction thereof; that said transcript on said appeal thereafter filed in the supreme court, and numbered 15472, was of no legal consequence and futile; that the said action of said supreme court, afterwards taken therein, affirming said judgment, was without jurisdiction and void, and that said remittitur was of no legal consequence, and void; that said matters did not prove the existence of any final judgment in said matter or proceeding against these claimants, Henry T. Blythe *et al.*, defendants therein.

All of said objections were overruled and the evidence was admitted; to which ruling these claimants duly excepted, which is now specified as—

Exception No. 2.

It was proven to the court that the value of the estate is $3,500,000 or thereabouts.

It appeared in evidence that no final account of the administrator of said estate had been filed, and there had been no final settlement of the accounts of the administrator in said estate, nor any final account rendered.

It was also proved on behalf of said Florence Blythe Hinckley that the said Florence Blythe Hinckley had married prior to the filing of said petition for distribution to, and was at the time
56 of the said hearing the wife of Frederick W. Hinckley.

These claimants further objected that, as no final account had been filed, nor any final settlement made of the accounts of the administrator of this estate, the court could not lawfully distribute the whole or any of said estate to Florence Blythe Hinckley; which objection the court overruled, and these claimants excepted and now specify the same as—

Exception No. 4.

These claimants further objected that a distribution of the entire estate could not lawfully be made upon a petition for a partial distribution; which objection was overruled by the court, to which ruling these claimants excepted; and now specify the same as—

Exception No. 5.

The foregoing was all of the evidence introduced at said hearing by petitioner, Florence Blythe Hinckley, necessary to explain the objections and exceptions made by said Henry Blythe *et al.*, upon said hearing as herein set forth.

These claimants, Henry T. Blythe *et al.*, were about to offer their proofs in opposition to said petition for distribution, when said petitioner objected to any evidence or proofs whatever being introduced or offered by said Henry T. Blythe *et al.*, on the ground that said Henry T. Blythe *et al.*, were in no wise interested in the estate of Thos. H. Blythe, deceased, and that the said judgment so as aforesaid given in Blythe *vs.* Ayres *et al.*, and the affirmance
57 thereof by the supreme court, constituted evidence conclusively binding upon and against said Henry T. Blythe *et al.*

Thereupon, and before any ruling was made, said Henry T. Blythe, *et al.*, offered and demanded that they be permitted to prove that no such judgment existed against them as is alleged against them in the said petition for distribution; because the said judgment (rendered Oct. 22, 1890, in the action or proceeding of Florence Blythe *vs.* Abbie Ayres *et al.*,) had never been entered in the judgment book; the time to appeal from said judgment had never arrived; the said judgment had never been entered; the said action or proceeding was still pending; the alleged appeal taken by Henry T. Blythe, *et al.*, as from said judgment, was taken by inadvertence under the impression that said judgment had been entered, and without the knowledge of said parties or their attorneys of the nonentry of said judgment; that said Henry T. Blythe, *et al.*, were parties defendant in said action or proceeding and were making a *bona fide* claim to the heirship and ownership of said estate; that said alleged appeal of Henry T. Blythe, *et al.*, as from said judgment, was futile; that the action of the supreme court as in affirming said judgment was without jurisdiction and void; that its remittitur to the superior court certifying its said action was void; that said remittitur never was attached to the judgment-roll, and no minute of the said affirmance of the supreme court was ever entered on the docket of said superior court. All of which said Henry T. Blythe, *et al.*, then and there offered to prove. And the court sustained the objection of said petitioner.

58 To which ruling said claimants, Henry T. Blythe, *et al.*, excepted, and now specify the same as—

Exception No. 6.

These claimants, Henry T. Blythe, *et al.*, further objected to the offer, introduction or reception of the record and alleged judgment of October 22, 1890, in the matter and proceeding of Blythe *vs.* Ayres *et al.*, and the alleged affirmance thereof by the supreme court in case No. 15472, and objected to any decree of distribution being made upon the same, on the ground that said alleged judgment was and is illegal, unconstitutional and void, for the reason that said court had not

jurisdiction to render the same upon the facts there found, stated and set forth in the written decision of said court, and as set out in the petition for distribution herein; that to render such a judgment upon such facts was to legislate judicially after descent cast, and thereby and by such judicial legislation, to deprive these claimants, Henry T. Blythe *et al.*, of their property without due process of law, and to deprive them of the equal protection of the law, in violation of the provisions of the Constitution of the United States, and particularly in violation of the provisions of section 10 of article 1 of said Constitution, and of the provisions of section 1, of article 14 of the amendments thereto; said Henry T. Blythe *et al.* objecting, that as a matter of public history, of which the courts will take judicial notice, at the time of the decease of said
59 Thomas H. Blythe, to wit: April 4, 1883, there was not and at the time such alleged judgment was rendered there was not, and at this time there is not any law upon the statute books or in the codes or decisions of the supreme court of this State, any law authorizing the giving of, or giving to the said court, jurisdiction to give or make such alleged judgment upon such facts.

Said objections and all of them were overruled by said court, and said alleged judgment of October 22d, 1890, was admitted and read in evidence; to which ruling these claimants duly excepted, and now specify the same as—

Exception No. 7.

When said remittitur from the supreme court in case No. 15472 was offered in evidence by petitioner, for the purpose of showing the affirmance by said supreme court of the alleged judgment of October 22, 1890, upon the alleged appeal therefrom of defendants, Henry T. Blythe, *et al.*, these claimants objected on the same grounds as last above stated and specified, which objection the court overruled, and these claimants duly excepted, and now specify the same as—

Exception No. 8.

And thereupon, on October 26, 1894, said superior court, without allowing these claimants, but refusing to allow them to offer any evidence in the matter, either in support of their claims to said estate, or in opposition to the claims of said petitioner thereto, proceeded to and did give, make and file in said matter and estate, its decision in writing, and caused the same to be entered in
60 the minute book of said court; of which decision the following is (omitting the description of property and other matters unnecessary to the point made in this bill of exceptions,) a copy, to wit:

(Title of Court and Estate.)

"*Findings on Distribution.*

Florence Blythe Hinckley having, on the 18th day of June, 1894, filed and presented to this court her petition and application, pray-

ing for a distribution to her of her share of the above-entitled estate to which she is entitled, and notice of said application having been given for the time, and in the manner required by law and the order of this court, and the Blythe Company, a corporation, claiming to be interested in said estate, having appeared and answered said petition, and resisted said application; and Alice Edith Blythe, claiming to be the widow of said Thomas H. Blythe, deceased, having appeared and answered said petition and resisted said application; and Henry Thomas Blythe, Joseph A. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Mrs. Penola E. Newport (*née* Blythe), Charles Blythe, Sr., Ellen Blythe, Esther Douglas (*née* Blythe), William S. Blythe, Ellen Rutherford, and Charles Blythe, Jr., claiming to be heirs and next of kin to said Thomas H. Blythe, deceased, having appeared and answered said petition, and resisted said application; and James Witt Pearce, claiming to be an heir and next of kin to said Thomas H. Blythe, having appeared and an-
61 swered said petition, and resisted said application; and William Savage, claiming to be an heir and next of kin to said Thomas H. Blythe, deceased, having appeared and answered said petition, and resisted said application; and Sarah Davis, claiming to be an heir and next of kin to said Thomas H. Blythe, deceased, having appeared and answered said petition, and resisted said application, and William F. McCann, claiming to be a creditor of said estate in the sum of one million two hundred and twenty-six thousand seven hundred and forty-three dollars ($1,226,743), having filed an opposition to said petition and resisted said application; and A. C. Freese, administrator of the estate of said Thomas H. Blythe, deceased, having answered said application; and the said matters having come on regularly to be heard by the court and evidence having been introduced, and the said matters having been thereupon submitted to the court for decision, and the court being now fully advised in the premises, finds as follows:

I.

That said Thomas H. Blythe died intestate in the city and county of San Francisco, State of California, on the 4th day of April, 1883, being at the time of his death a citizen of the United States and a resident of said city and county, and leaving estate therein and elsewhere; that he died unmarried, and left no widow surviving.

II.

That on the 12th day of June, 1883, the superior court of
62 the city and county of San Francisco did duly give and make its judgment wherein and whereby it did appoint one Philip A. Roach administrator of the estate of the said Thomas H. Blythe, deceased, and pursuant to said judgment, letters of administration upon the estate of said Thomas H. Blythe, deceased, were, on the said 12th day of June, 1883, issued to said Philip A. Roach, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and thereafter continued to be the duly ap-

pointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased, until the 27th day of April, 1889, on which last-mentioned day said Philip A. Roach died.

That thereafter, and on the 10th day of May, 1889, said superior court of the city and county of San Francisco did duly give and make its judgment, wherein and whereby it did appoint James C. Pennie administrator of the estate of said Thomas H. Blythe, deceased, in the place and stead of said Philip A. Roach, deceased. Pursuant to such judgment letters of administration upon the estate of said Thomas H. Blythe, deceased, were, on the 10th day of May, 1889, issued to said James C. Pennie, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and thereafter continued to be the duly appointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased, until the 9th day of December, 1893, on which last-mentioned day said James C. Pennie died; and thereafter, and on the 24th day of December, 1893, said superior court of the city and county of
63 San Francisco did duly give and make its judgment, wherein and whereby it did appoint A. C. Freese administrator of the estate of said Thomas H. Blythe, deceased, in the place and stead of said James C. Pennie, deceased, and pursuant to such judgment letters of administration upon the estate of said Thomas H. Blythe, deceased, were on the 26th day of December, 1893, issued to said A. C. Freese, who thereupon, on the day and year last aforesaid, duly qualified as such administrator, and has ever since been and still is the duly appointed, qualified and acting administrator of the estate of said Thomas H. Blythe, deceased.

III.

That on the 23rd day of June, 1883, notice to the creditors of said estate was duly published in the manner and form and for the time required by law and the order of this court, and on the 22nd day of May, 1884, the said superior court of the city and county of San Francisco did duly give and make and enter, in the matter of the said estate, its order and decree establishing that due notice to the creditors of said estate had been given.

IV.

That after the expiration of one year from the issuing of letters of administration to said Philip A. Roach upon the said estate of Thomas H. Blythe, deceased, to wit: on the 1st day of October, 1885, said Florence Blythe Hinckley, then Florence Blythe,
64 claiming to be the sole heir of said deceased, and to be entitled to distribution of the whole of said estate, did, under the name of Florence Blythe, file in the said superior court, in the matter of the above-entitled estate of said Thomas H. Blythe, deceased, her petition, therein setting forth her right to said estate, and her kinship, heirship and relationship to said Thomas H. Blythe, deceased, and therein and thereby praying said court to ascertain and declare the rights of all persons to said estate, and all

interests therein, and to whom distribution thereof should be made, and praying for the making of an order fixing a day, and for the issuing of a notice requiring all persons having or claiming any interest in the estate of said Thomas H. Blythe, deceased, to appear in said court in the matter of the said estate, under and in accordance with the provisions of section 1664 of the Code of Civil Procedure of the State of California, which said petition remains on file in the matter of the said estate in said court, and was and is sufficient in substance and form to entitle the said Florence Blythe Hinckley to the relief, orders and notices therein asked for; and thereafter, to wit: on the 5th day of October, 1885, such proceedings were had upon said petition that said court duly gave and made an order fixing Monday, February 1st, A. D. 1886, at the hour of 10 o'clock A. M., at the court-room of said court, in the new city hall, in said city and county of San Francisco, as the time and place for the appearance of all persons, named or not named, having or claiming any interest in the estate of said Thomas H. Blythe,
deceased, which order directed service of notice on all per-
65 sons interested in said estate, to appear and show cause on a
day therein named, not less than sixty (60) days nor over four (4) months from the date of the making of such order, to wit: on February 1st, A. D. 1886, which order was on the said 5th day of October, 1885, duly filed in said court; and thereafter such proceedings were duly had pursuant to said last-named order that on October 16th, 1885, a notice, as by said order required, was duly given, in which notice, as under and by said order directed, was set forth the name of the deceased, to wit: Thomas H. Blythe, deceased; the name of the administrator of the said estate, to wit: Philip A. Roach, who was then the administrator of the estate of the said Thomas H. Blythe, deceased; the names of all persons who had appeared claiming any interest in said estate, in the course of administration of the same up to the time of the making of said order, and such other persons as the court directed; and also a description of the real estate whereof the said Thomas H. Blythe, deceased, died seized or possessed, so far as known, described with certainty to a common intent, which notice required all said persons, and all persons, named or not named, having or claiming any interest in the estate of said Thomas H. Blythe, deceased, at the time and place in said order specified, to wit: on Monday, February 1st, A. D. 1886, at the hour of 10 a. m., at the court-room of said court, in the new city hall, in said city and county of San Francisco, to appear and exhibit in the manner provided by law, their respective
claims of heirship, ownership or interest in said estate, which
66 said notice was duly and legally served within the time and
in the manner and form required by law, and full and complete proof of such service was made to the satisfaction of said court; and thereupon, to wit: on the 5th day of February, 1886, said court duly gave, made and entered its order and decree establishing proof of the full and complete service of said notice, as in and by said order directed, and as by law provided and required; and, pursuant to said notice, on said 1st day of February, 1886, there appeared in

the matter of the said estate the following-named persons, namely:" * * * (naming all the parties who had so appeared, including these parties called in this bill of exceptions Henry T. Blythe *et al.*,) "and Philip A. Roach, administrator of the estate of said Thomas H. Blythe, deceased, entries of which appearances were duly made in the minutes of said court, and in the register of the proceedings in said estate; and Florence Blythe Hinckley, then Florence Blythe, pursuant to said notice, and within the time required thereby and by law, did also, under the name of Florence Blythe, appear in obedience thereto, an entry of which appearance was duly made in the minutes of said court, and in the register of the proceedings of said estate.

That after the expiration of the time limited for appearing, said court did, to wit: on the 24th day of February, A. D. 1886, give, make and enter its order and decree, wherein and whereby it adjudged the default of all persons for not appearing, as required in and by said notice, who had not appeared as so required, which order,
67 judgment and decree still remains in full force and effect.

That within the time prescribed by law said Florence Blythe Hinckley, then Florence Blythe, did, under the name of Florence Blythe, file her complaint in the matter of the estate of said Thomas H. Blythe, deceased, setting forth the facts constituting her claim of heirship, ownership and interest in said estate, in the manner required by law, and did serve a copy of the same upon each of the parties who had appeared as aforesaid; that all of the parties who had appeared as aforesaid, other than the said Florence Blythe, were made defendants in said complaint, and said Florence Blythe, was made plaintiff therein.

That after the said James C. Pennie qualified as administrator of the estate of said Thomas H. Blythe, deceased, as hereinbefore stated, and prior to the time that the decision and judgment hereinafter mentioned were given or made, the said James C. Pennie, as such administrator, was duly substituted as one of the defendants in the proceeding in which said complaint was filed in the place and stead of said Philip A. Roach, deceased.

That thereafter, said persons who had so appeared as aforesaid, claiming heirship, ownership, or interest in said estate, filed their respective answers to the said complaint of said Florence Blythe, and their respective pleadings in said matter, therein respectively setting forth the facts constituting their respective claims of heirship, ownership and interest in the said estate; and there-
68 after, in due course, the said proceeding and the issues arising upon said complaint, answers and pleadings and all of the claims of heirship, ownership and interest in said estate of all of the said persons, came on regularly for trial before the court, and were tried by the said court upon the merits thereof, and the same were, in due course, regularly submitted to the court for adjudication and decision; and thereafter, to wit: on the 22nd day of October, 1890, the said court, in said matter and proceeding, duly gave and made its decision in writing, and duly gave, made and entered its judgment therein, which said decision in writing and judgment are set forth

at length in the said petition of distribution of said Florence Blythe Hinckley, in and by which judgment it was adjudged and decreed that said Florence Blythe was, and is, the child and daughter of said Thomas H. Blythe, deceased; that said Thomas H. Blythe, deceased, legally adopted her as his lawful child and heir; that she is the sole owner of all the estate of said Thomas H. Blythe, deceased, of every name, nature and description wherever situated, and that she is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased; and adjudged and decreed that all the defendants in said proceeding, and all persons, known or unknown, other than said plaintiff, Florence Blythe, are not, nor is any of them, entitled to distribution, in whole or in part, of any of the estate of said Thomas H.
69 Blythe, deceased; nor are they, or any of them, heirs, or any heir, of said Thomas H. Blythe, deceased; nor have they, or any of them, any ownership of, or interest in, the estate of said Thomas H. Blythe, deceased.

V.

That said judgment still remains in full force and effect, and has not been in anywise reversed, vacated or annulled; that certain of the aforesaid parties to the said proceeding in which said judgment was given, made, and entered, and who appeared therein as hereinbefore stated, appealed from said judgment to the supreme court of said State of California, and prosecuted their appeals in said supreme court; that said appeals have all been heard by said supreme court, and that judgment has been duly given and made by the said supreme court upon the case of each of said appeals, after hearing each of said appeals, affirming said judgment of said superior court; and that in the case of each of said appeals a remittitur has been issued from said supreme court to, and filed in, said superior court, stating the affirmance by said supreme court of the said judgment of said superior court; that the names of the parties by whom said appeals were thus taken and prosecuted, and the dates upon which said judgment was given and made, as aforesaid, by said supreme court on each of said appeals affirming the said judgment of said superior court, are as follows:

That one of said appeals was taken by the aforesaid Elizabeth Powell, Sarah Roberts, John Barnes, Joseph Barnes, Sarah
70 Foulkes, Thomas Hughes, Sarah Ann Hughes, John Williams, Charles Williams, Thomas Williams, Edward Williams, Mary Platt, Margaret Williams, and Margaret Williams, widow of Ebenezer Williams, deceased, Ann Ruth Williams, John Charles Williams, and Margaret May Williams, being case No. 14938 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 30th day of November, 1892, affirming said judgment of said superior court;

That one of said appeals was taken by Henry T. Blythe, Joseph A. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Penola E. Newport, Charles Blythe, Senior, Charles Blythe, Junior,

Ellen Blythe, Esther Douglas, Elizabeth Shelton, Ellen Rutherford and William S. Blythe, being case No. 15472 in said supreme court; that the judgment of the supreme court on said appeal was given and made as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by Alfred Savage, Mary Ann Standen, John Savage, Frederick Savage, Henry C. Savage, Eliza Ann Percival, Johanna Hall and William Yetton, being case No. 15532 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by William Savage and David Savage, being case No. 15437 in said supreme court; that the
71 judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by the Blythe Company, being case No. 15411 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court;

That one of said appeals was taken by James Witt Pearce, being case No. 15433 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court; and

That one of said appeals was taken by Alice Edith Blythe, being case No. 15479 in said supreme court; that the judgment of the supreme court on said appeal was given and made, as aforesaid, on the 24th day of April, 1894, affirming said judgment of said superior court.

VI.

That Henry Thomas Blythe, Joseph A. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Mrs. Penola E. Newport (*née* Blythe), Charles Blythe, Sr., Ellen Blythe, Esther Douglas (*née* Blythe), William S. Blythe, Ellen Rutherford and Charles Blythe, Jr., are not, nor is any of them, in anywise related to or in any manner akin to said Thomas H. Blythe, deceased, nor are they heirs, nor is any one of them an heir, of said deceased, nor
72 have they, nor any one of them, any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased.

VII.

That Alice Edith Blythe is not the widow of, nor in anywise related to, nor in any manner akin to said Thomas H. Blythe, deceased, nor is she an heir of said Thomas H. Blythe, deceased, nor has she any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased.

VIII.

That James Witt Pearce is not in anywise related to, nor in any manner akin to said Thomas H. Blythe, deceased, nor is he an heir of said Thomas H. Blythe, deceased, nor has he any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased.

IX.

That William Savage is not in anywise related to, nor in any manner akin to said Thomas H. Blythe, deceased, nor is he an heir of said Thomas H. Blythe, deceased, nor has he any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased.

X.

That Sarah Davis is the sister of William Savage mentioned in finding IX, and said Sarah Davis is not in anywise related to, nor in any manner akin to said Thomas H. Blythe, deceased,
73 nor is she an heir of said Thomas H. Blythe, deceased, nor has she any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased.

XI.

That William Jones, John Cornall, Alexander Jones, Elizabeth Jaques, Charles F. MacDermot, Hosmer P. McKoon, Ann Jane Maudsley, Hannah Monck, Eleanor Blythe Page, James Blythe Page, Jane Page, George Marshall Shaw, George W. Towle, Jr., Ann Jane Jones, George Page, Robert Dover, Elizabeth Dover and Thomas Nelson White, are not, nor is any of them, in anywise related to, or in any manner akin to said Thomas H. Blythe, deceased, nor are they heirs, nor is any one of them an heir, of said deceased, nor have they, nor has any one of them, any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased, nor are the descendants of Alexander Blyth- and Mary (Weaver) his wife, who are mentioned in the answer of the Blythe Company to the said petition of Florence Blythe Hinckley, nor is any of them, in anywise related to or in any manner akin to said Thomas H. Blythe, deceased, nor are they heirs, nor is any of them an heir, of said deceased, nor have they, nor has any one of them, any ownership of, or interest in, or claim to any of the estate of said Thomas H. Blythe, deceased, and the Blythe Company, a corporation as aforesaid, has not any ownership of, nor any claim to any of the estate of said Thomas H. Blythe, deceased, nor is it in anywise interested therein.

74 XII.

That said Thomas H. Blythe, deceased, left him surviving said Florence Blythe, who was and is the only child and daughter of said Thomas H. Blythe, deceased; that said Thomas H. Blythe, deceased, legally adopted her as his lawful child and heir; that she

is the sole owner of all of the estate of said Thomas H. Blythe, deceased, of every name, nature and description, wherever situated, and that she is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased.

XIII.

That said Florence Blythe, child of said Thomas H. Blythe, deceased, was married on the 21st day of September, 1892, to Frederick W. Hinckley.

XIV.

That the said Thomas H. Blythe died seized and possessed and the owner of all and singular the following lands, premises and real property and interest therein, which now constitute part of the said estate of said Thomas H. Blythe, deceased, to wit: * * * (Here follows a description of the lands and property belonging to said estate.)

XV.

75 That there is in the hands of the administrator of the estate of said deceased, as part of the said estate, the sum of one hundred and twenty-five thousand five hundred and fifty-three dollars and forty-nine cents ($125,553.49).

XVI.

That the alleged claim of William F. McCann was presented to the administrator of the said estate long after the time for the presentation of claims against said estate had expired, and the said alleged claim of said McCann is not and does not constitute a debt or charge against said estate.

XVII.

That said estate is indebted for expenses of administration unto James C. Pennie, Jr., as executor of the will of James C. Pennie, late administrator, for the unpaid balance of the services of his attorneys rendered to him as administrator of said estate, and for his commissions as such administrator. A suit for the settlement of the account of said James C. Pennie, late administrator, was instituted by the present administrator against James C. Pennie, Jr., in this court, which suit is numbered 13786, and wherein a judgment has been made and given. An appeal from said judgment is now pending.

XVIII.

That the time for filing or presenting claims against said estate has long since expired, and all claims that have been allowed have been paid. That said estate is but little indebted, and the
76 share of said estate to which said Florence Blythe Hinckley is entitled, to wit: the whole of said estate, may be immedi-

ately allowed and distributed to said Florence Blythe Hinckley without loss to the creditors or to any creditor of said estate; and no injury can result to the said estate or to any one interested therein by the immediate distribution to said Florence Blythe Hinckley of all of said property, with the exception of the money now in the hands of the administrator of said estate.

As conclusions of law from the foregoing findings, the court concludes and determines:

That said Florence Blythe Hinckley is entitled to have immediately allowed and distributed to her the whole of the said property and estate of the said Thomas H. Blythe, deceased, with the exception of the money of said estate which is now in the hands of the administrator of said estate.

That said property and estate so distributed to said Florence Blythe Hinckley, and the possession thereof, shall be given and delivered to her upon her giving to the administrator of said estate a bond in the sum of 150,000 dollars, with two sufficient sureties, to be approved by the judge of this court, conditioned for the payment by said Florence Blythe Hinckley of her portion of the debts of said estate, to wit: the whole of the debts of said estate.

That said property so distributed to said Florence Blythe Hinckley shall be and remain liable, in her hands, for the payment of the costs and expenses of administration, and of any final judg-
77 ment that may be recovered in the said action of A. C. Freese, administrator of the estate of Thomas H. Blythe, deceased, *v.* J. C. Pennie, Jr., administrator of the estate of J. C. Pennie, deceased.

Dated October 26th, A. D. 1894.

J. V. COFFEY, *Judge.*

(Endorsed): Filed Oct. 26, 1894. M. C. Haley, clerk, by J. P. Sherrard, deputy clerk.

And on said October 26, 1894, said court, on said last-named decision aforesaid, made its decree of distribution, distributing the whole of said estate to Florence Blythe Hinckley; which decree was entered in the minutes October 27, 1894, and of which decree the following is a copy:

(Title of Court and Estate.)

Decree of Distribution.

Florence Blythe Hinckley having on the 18th day of June, 1894, filed and presented to this court her petition and application praying for the distribution to her of the share of the above-entitled estate to which she is entitled, and notice of the said application having been given for the time and in the manner required by law and the order of this court, and it appearing that the said notice has been duly and regularly served upon and given to the administrator personally, and given to all persons interested in said estate

in the manner required by law, and certain persons who are mentioned in the findings herein, claiming to be interested in the said estate, having appeared and answered said petition and re-
78 sisted said application, and the said matters having come on regularly for hearing, and oral and documentary evidence having been introduced in support of the said petition and application of said Florence Blythe Hinckley, and it appearing upon said hearing that more than one year has elapsed since the issuance of letters of administration upon said estate; that the time for filing or presenting claims against said estate has long since expired, and that all claims that have been allowed have been paid; that said estate is but little indebted, and that the share of said estate to which said Florence Blythe Hinckley is entitled, with the exception of the money now in the hands of the administrator of said estate, may be immediately allowed and distributed to said Florence Blythe Hinckley without loss to the creditors or to any creditor of said estate, and that no injury can result to said estate or to any one interested therein by the immediate distribution thereof to said Florence Blythe Hinckley; and the said matters having been submitted to the court for decision, and the court having maturely considered all the facts and the law in the premises, and made and filed its findings of fact and conclusions of law therein:

It is therefore hereby ordered, adjudged and decreed that all of the property and estate of Thomas H. Blythe, deceased, of every name, nature, and description, wherever situated, with the exception of the money now in the hands of the said administrator, be and the same is hereby allowed and distributed to said Florence Blythe Hinckley.

79 That the property affected by this decree and of which distribution is hereby made is, so far as the same is now known, the following: * * *

(Here follows a description of all the real property belonging to said estate.)

"That the said property hereby distributed to said Florence Blythe Hinckley and the possession thereof, shall be given and delivered to said Florence Blythe Hinckley upon her giving to the administrator of said estate a bond in the sum of $150,000, with two sufficient sureties to be approved by the judge of this court, conditioned for the payment by said Florence Blythe Hinckley of her proportion of the debts of said estate, to wit: the whole of the debts of said estate. That said property hereby distributed to said Florence Blythe Hinckley shall be and remain liable in her hands for the payment of the costs and expenses of administration and of any final judgment that may be recovered in the action of A. C. Freese, administrator of the estate of Thomas H. Blythe, deceased, *vs.* J. C. Pennie, Jr., administrator of the estate of J. C. Pennie, deceased, referred to in the findings herein.

Dated October 26th, 1894.

J. V. COFFEY, *Judge.*

(Endorsed:) Filed Oct. 26, 1894.

"Recorded October 27th, 1894, in Minute Book 168, at page 75."

On October 29th, 1894, said petitioner, Florence Blythe Hinckley, served these claimants with written notice of said decision,
80 and on November 8th, 1894, these claimants served on petitioner, and filed their notice of intention to move for a new trial of the same; of which notice the following is a copy:

(Title of Court and Estate.)

To Florence Blythe Hinckley; a claimant, A. C. Freese, administrator of said estate, and all other claimants of the said estate of Thomas H. Blythe, deceased:

You, and each of you, will please take notice that Henry T. Blythe *et al.*, the claimants of the above-named estate, who have hitherto appeared, and have been and are represented by S. W. & E. B. Holladay, as their attorneys therein, intend to move said court to set aside and vacate its decision, signed and filed October 26th, 1894, in said estate, in favor of said Florence Blythe Hinckley, granting her petition to distribute said estate to her, and against these claimants of said estate, Henry T. Blythe *et al.*; and to grant these claimants a new trial herein, on the following grounds, namely:

I. Insufficiency of the evidence to justify said decision.

II. That said decision is against law.

III. Error in law occurring at the trial, and excepted to by these claimants.

Said motion and application will be based upon a bill of exceptions, to be hereafter prepared.

S. W. & E. B. HOLLADAY,
Attorneys for Henry T. Blythe et al.,
Claimants of said Estate.

81 *Specification of Errors.*

And in their said notice of intention to move for a new trial herein, said claimants, Henry T. Blythe *et al.*, having specified as a ground of said motion "insufficiency of the evidence to justify the decision," now specify, in this, their bill of exceptions, to be used upon said motion, as particulars of said insufficiency, the following: The evidence is insufficient to justify that part of finding 4 which reads that said superior court, in said matter and proceeding, gave or made or entered its judgment therein, or that which recites that anything was adjudged or decreed in said alleged judgment of October 22d, 1890, either that Florence Blythe was the child or heir of or adopted by said Thomas H. Blythe, deceased, or entitled to any of his estate.

The evidence is insufficient to justify that part of finding 5 which finds that said judgment was or is in full or any force or effect, or that certain or any of the parties thereto ever appealed to the supreme court or ever prosecuted any such appeal, or that the supreme court affirmed the alleged judgment on any of said appeals, or that any valid remittitur has been issued by said supreme court, as the

evidence did show that there was never any entry of said judgment in any judgment book.

The evidence was insufficient to justify finding 6, wherein it is found that these claimants, Henry T. Blythe and his codefendants there named, are not related or akin to nor heir of said Thomas H.
Blythe, deceased, there being no evidence to support that
82 finding, the record and alleged judgment therein in Blythe *vs.*
Ayres *et al.*, being the only evidence introduced, shows that the contest of heirship is still pending and undetermined.

The evidence is insufficient to justify finding 12 or any part thereof, to wit, that Florence Blythe was the child of Thomas H. Blythe, deceased, or that he adopted her in anywise, or that she is the owner of any of his estate or entitled to distribution of any of said estate, or that she is any heir of said decedent.

The evidence is insufficient to justify that part of finding 13 which indicates that the Florence Blythe who married Frederick W. Hinckley was the child of Thomas H. Blythe, deceased.

The evidence is insufficient to justify that part of finding 18 which reads that "the whole of said estate may be immediately allowed and distributed to said Florence Blythe Hinckley without loss to the creditors or any creditor of said estate, and no injury can result to the estate or to any one interested therein by the immediate distribution to said Florence Blythe of all of said property, with the exception of the money now in the hands of the administrator of said estate."

Said findings are insufficient to justify the conclusions of law, so called, set forth in said decision or any one of such conclusions, and the evidence is insufficient to justify any one or all of said conclusions of law, if the same or any of them shall be deemed to be findings of fact.

And said Henry T. Blythe *et al.*, claimants, having specified in
their said notice of intention, as a ground of motion, that the
83 decision is against law, now specify the following as particulars thereof:

That the said decision and the conclusions of law and each one thereof is without warrant of law therefor in the statutes or codes of this State.

That the said conclusions of law were and each one thereof was beyond the jurisdiction of the court to make upon the facts found herein, and were and each thereof was and is in violation of the Constitution of the United States, and particularly of section 10, article 1 thereof, and of section 1 of article XIV of the amendments thereto.

And said Henry T. Blythe *et al.*, having in their notice specified as a ground of motion "error in law occurring at the trial and excepted to by these claimants," now specify and rely upon each of the exceptions above set forth and each of the grounds urged at said trial and set forth herein and numbered from 1 to 8.

The description of the property of this estate and the names of the various claimants being contained in the decree of distribution of October 26th, 1894, aforesaid, may be referred to without repeti-

tion where they occur in each of the other papers composing the bill of exceptions.

And now the said claimants, Henry T. Blythe *et al*, present the foregoing bill of exceptions to be used upon their motion for a new trial, and also for the purpose of their appeal from said decree of distribution, and pray that the same be allowed, certified as correct, and filed.

84 Dated this 23d day of November, 1894.

HENRY T. BLYTHE ET AL.,
Claimants,
By S. W. & E. B. HOLLADAY,
Their Attorneys.

The foregoing bill of exceptions is correct and is hereby allowed and settled.

March 25, 1895.

J. V. COFFEY, *Judge.*

The foregoing bill of exceptions was used on the argument and hearing of the motion for new trial, 8th April, 1895.

J. V. COFFEY, *Judge.*

Notice of Appeal from Decree of Distribution.

(Title of Court and Estate.)

Please take notice that Henry T. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Charles Blythe, Sr., Charles Blythe, Jr., Ellen Blythe, Esther Douglas, Elizabeth Shelton, Ellen Rutherford, and William S. Blythe, claimants to this estate, and who have been and still are represented in the above-named estate by S. W. and E. B. Holladay, their attorneys, hereby appeal to the supreme court of the State of California from the decree of distribution herein made, signed, and filed October 26, 1894, and entered October 27th, 1894, in Minute Book 168, page 75 and following, distributing said estate to Florence Blythe Hinckley.

Respectfully, S. W. & E. B. HOLLADAY,
Att'ys for Henry T. Blythe et al.

85 To the clerk of said court, and to Florence Blythe Hinckley and her attorneys, and to the administrator, A. C. Freese, and his attorneys, and to all persons interested in said estate.

Duly served and filed Oct. 29, 1894.

Order Denying Motion for New Trial.

(Title of Court and Estate.)

No. 2401.

The motion of Henry T. Blythe *et al.* for a new trial in the matter of the application of Florence Blythe Hinckley for distribution in

the above-entitled estate coming on regularly to be heard this day, and the same having been argued and submitted to the court for decision, it is hereby ordered that said motion for new trial be, and the same is hereby, denied; to which order defendants except.

Done in open court this 8th day of April, 1895.

J. V. COFFEY, *Judge.*

Notice of Appeal from Order Denying New Trial.

(Title of Court and Estate.)

You will please take notice that the claimants herein, known as Henry T. Blythe *et al.*, appeal to the supreme court of this State from the order of said superior court denying the motion of said Henry T. Blythe *et al.* for a new trial in the matter of the application of Florence Blythe Hinckley for distribution; which
86 order was given and made April 8, 1895, and entered in Minute Book 172, at page 534.

S. W. & E. B. HOLLADAY,
Attorneys for said Henry T. Blythe et al.

San Francisco, April 23, 1895.

To the clerk of said superior court, to Florence Blythe Hinckley and her attorneys, and to all other parties in interest and their attorneys.

(Duly served and filed April 23d, 1895.)

Estate of THOMAS H. BLYTHE, Deceased.

Certificate to Transcript.

It is hereby certified that the foregoing transcript is correct, and that sufficient undertakings on appeal in due form of law were properly filed on said two appeals respectively.

W. H. H. HART,
Attorney for Florence Blythe Hinckley.

GARBER, BOALT AND BISHOP,
Of Counsel.

86½ Due service of the within is hereby admitted this 1st day of May, 1895.

W. H. H. HART,
Att'y for Florence Blythe Hinckley.

GARBER, BOALT & BISHOP,
Of Counsel.

87 (S. F. No. 98. In Bank. November 30, 1895.)

In the Matter of the Estate of THOMAS H. BLYTHE, Deceased; HENRY T. BLYTHE *et al.*, Appellants.

Estates of deceased persons—Proceeding to determine heirship—Entry of final decree.—The final order or decree in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship is properly entered when spread at length upon the minute book of the court in probate. It is not necessary that it should be entered in a judgment book.

Appeal from a decree of the superior court of the city and county of San Francisco distributing the estate of a deceased person and from an order refusing a new trial—J. V. Coffey, judge.

The facts are stated in the opinion of the court.

S. W. & E. B. Holladay, for appellants, Henry T. Blythe *et al.*

W. H. H. Hart and Garber, Boalt & Bishop, for respondent.

HENSHAW, *J.*:

This is an appeal by Henry T. Blythe and others from the decree of distribution in the matter of the above-entitled estate.

The petition for distribution was presented by Florence Blythe. She averred as the foundation of her claim the decision and judgment made in the matter of said estate in the proceeding entitled Florence Blythe *v.* Abbie Ayres *et al.* The appellants appeared, joined issued with the petitioner, and pleaded *nul tiel record.*

Upon the hearing, the decision of the court as entered in the probate minute book upon October 22, 1890, was offered and
88 admitted in evidence over the objection of appellants. Appellants in turn "offered and demanded that they be permitted to prove that no such judgment existed against them as is alleged against them in the said petition for distribution, because the said judgment (rendered October 22, 1890, in the action or proceeding of Florence Blythe *v.* Abbie Ayres *et al.*) had never been entered in the judgment book; the time to appeal from said judgment had never arrived; the said judgment had never been entered; the action or proceeding was still pending; the alleged appeal taken by Henry T. Blythe *et al.* as from said judgment was taken by inadvertence, under the impression that said judgment had been entered, and without the knowledge of said parties or their attorneys of the non-entry of said judgment; that said Henry T. Blythe *et al.* were parties defendant in said action or proceeding and were making a *bona fide* claim to the heirship and ownership of said estate; that said alleged appeal of Henry T. Blythe *et al.* as from said judgment was futile; that the action of the supreme court as in affirming said judgment was without jurisdiction and void; that its remittitur to the superior court certifying its said action was void; that said remittitur was never attached to the judgment-roll, and no minute of said affirmance of the supreme court was ever entered on the docket of said superior court." The court sustained the objection of petitioner to this offer. The offer, it will be observed, was to show

that the alleged judgment did not exist, because it had never been entered in the judgment book. No claim was made by petitioner that it had been so entered. Indeed, petitioner rested her
89 cause upon the affirmative showing that entry had been made in the minute book.

That this entry was sufficient has thrice been decided in the matter of this estate (Blythe *v.* Ayres, *ante*, p. 227). There was thus before the court an affirmative showing of a sufficient entry. For appellants to have proved that it was not entered in some other book could not have advantaged them, and the refusal of the court to allow them to make such proof could not have injured them.

The decree and order appealed from are affirmed.

The order of this court, made upon application of appellants herein, restraining the probate court from proceeding further in the matter of the distribution of said estate, is also vacated and dissolved.

McFarland, J., Van Fleet, J., Garoutte, J., and Temple, J., concurred.

90 (Page 113, Judgment-roll 13 of the Supreme Court.)

In the Supreme Court of the State of California.

In Bank. S. F. No. 98. November 30th, 1895.

Estate of THOMAS H. BLYTHE, Deceased, *vs.* HENRY T. BLYTHE *et al.*, Appellants.	On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Henshaw, J.

We concur.

McFARLAND, *J.*
VAN FLEET, *J.*
GAROUTTE, *J.*
TEMPLE, *J.*

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the decree and order of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same are hereby, affirmed.

The order of this court, made upon application of appellants herein, restraining the probate court from proceeding further in the matter of the distribution of said estate, is also vacated and dissolved.

91 (*Transcript from Register of Actions.*)

In the Supreme Court of the State of California.

Page 16, 134, Register of Actions, vol. 31, San Francisco.

S. F. No. 98. Probate.

Estate of THOMAS H. BLYTHE, Deceased.

W. H. H. Hart; Garber, Boalt & Bishop.
S. W. & E. B. Holladay.

1895, Nov. 30.—Decree and order appealed from are affirmed. The order of this court, made on application of app., restraining the probate court from proceeding further in matter of dist. of said estate, is vacated & dissolved.

HENSHAW, *J.*

We concur.
McFARLAND, *J.*
VAN FLEET, *J.*
GAROUTTE, *J.*
TEMPLE, *J.*

Beatty, C. J., and Harrison, J., deeming themselves disqualified, took no part in the decision of this cause.

Dec. 31.—Remittitur to county clerk.

92 In the Supreme Court of the State of California.

In Bank. *No.* S. F. No. 98. November 30.

Estate of THOMAS H. BLYTHE, Deceased, *vs.* HENRY T. BLYTHE *et al.*, Appellants.	On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Henshaw, J.

We concur.
McFARLAND, *J.*
VAN FLEET, *J.*
GAROUTTE, *J.*
TEMPLE, *J.*

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the decree and order of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same are hereby, affirmed.

The order of this court, made upon application of appellants

herein, restraining the probate court from proceeding further in the matter of the distribution of said estate, is also vacated and dissolved.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 30th day of November, 1895, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 31st day of December, A. D. 1895.

[Seal of the Supreme Court of the State of California.]

T. H. WARD, *Clerk*,
By A. W. JOHNSON, *Deputy*.

93 [Endorsed:] S. F. No. 98. In the supreme court, State of California. Copy remittitur. Estate of Thomas H. Blythe, deceased, *vs.* Henry T. Blythe *et al.*

Clerk's costs..... $
Paid by appellant-..... $
Paid by respondent..... .....

Total..... .....

T. H. Ward, clerk, by —— ——, deputy.

(Endorsed:) Filed in the office of the clerk of the superior court, city & county of San Francisco, December 31, 1895.

94 In the Supreme Court of the State of California.

S. F. No. 98.

In the Matter of the Estate of THOMAS H. BLYTHE, Deceased; HENRY T. BLYTHE *et al.*, Appellants.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing 86½ printed pages, numbered from 1 to 86½, inclusive, contain a full, true, and correct copy of the record and transcript on appeal of Henry T. Blythe, John W. Blythe, William W. Blythe, James T. Blythe, Charles Blythe, Senior, Charles Blythe, Junior, Ellen Blythe, Esther Douglas, Elizabeth Shelton, Ellen Rutherford, and William S. Blythe, appellants, on file in the office of the clerk of the supreme court of the State of California in the matter of the estate of Thomas H. Blythe, deceased, from the decree of distribution and from the order denying their motion for a new trial, and that said pages contain a full, true, and correct copy of the transcript on appeal in said cause.

And I further certify that the foregoing typewritten pages, numbered from 88 to 89, inclusive, contain a full, true, and correct
95 copy of the opinion of said supreme court of the State of California in said cause upon said appeal, and as reported in 110 California Reports, commencing at page 229.

And I further certify that the foregoing typewritten page numbered 90 contains a full, true, and correct copy of the judgment of said supreme court of the State of California in said cause on said appeal and proceedings on said appeal, and that page numbered 91 contains a full, true, and correct copy of the entries in the Register of Actions, volume 31, page 16134, in said cause and proceedings in said supreme court on said appeal, S. F., No. 98, and that page numbered 92 contains a full, true, and correct copy of the remittitur issued by said supreme court to the superior court of the city and county of San Francisco, State of California, in the matter of said cause in said estate upon affirming the decree and order appealed from, and that the whole of the foregoing 93 pages, as aforesaid, numbered from 1 to 92, inclusive, including pages 86½, contains a full, true, and correct copy of the whole records and all of the proceedings in the above and therein entitled action on said appeal, and that the same together constitute the whole and all the records and the whole and all the proceedings had in said cause in said supreme court of the State of California on said appeal.

And I further certify that the foregoing certified copy of the record in said cause and the proceedings therein is made at the instance and request of William H. H. Hart, attorney for Florence Blythe Hinckley, and at his request the same is directed to the clerk of the Supreme Court of the United States, to be filed in the cause
96 of Henry T. Blythe *et al.*, plaintiffs in error, against Florence Blythe Hinckley, now pending in the Supreme Court of the United States on writ of error to the supreme court of the State of California.

And I further certify that the foregoing constitutes the whole of the record and proceedings, with all things concerning the same, which were commanded to be sent to the Supreme Court of the United States by the writ of error issued out of said Supreme Court of the United States on the 24th day of March, A. D. 1897, and that the same is made in pursuance to said writ and the command thereof.

Witness my hand and the seal of said court, this 24th day of April, A. D. 1897.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California.

Costs for supplying and certifying above record..... $24 50
Postage 25

T. H. WARD, *Clerk*,
By E. S. BUTTERWORTH, *Dep.*

Endorsed on cover: Case No. —. California supreme court. Term No., —. Henry T. Blythe *et al.*, plaintiffs in error, *vs.* Florence Blythe Hinckley. Filed —— —, 189–.

97 SAN FRANCISCO, CAL., *May* 1, 1897.

J. H. McKenney, clerk of the United States Supreme Court, Washington, D. C.:

In Supreme Court, State of California.

In Matter of Estate of THOMAS H. BLYTHE, Deceased; HENRY T. BLYTHE and Others, Appellants. S. F., No. 98.

STATE OF CALIFORNIA, *City and County of San Francisco,* } *ss.*:

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that there was lodged in the office of said clerk on the 30th day of April, 1897, a writ of error from the Supreme Court of the United States, directed to the honorable the judges of the supreme court of the State of California, in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss.*:

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry T. Blythe, John W. Blythe, William W. Blythe, *et al.*, appellants, and Florence Blythe Hinckley, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the
98 validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error has happened, to the great damage of Henry T. Blythe, John W. Blythe, William W. Blythe, Boswell M. Blythe, heir and successor in interest of James T. Blythe, deceased, and William S. Blythe, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court

of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington within 60 days from the date hereof, that, the record and proceedings aforesaid being duly inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the
(Supreme Court of the) *United States.*

Allowed by—
(Signed) STEPHEN J. FIELD,
Associate Justice of the Supreme Court
of the United States.

(Endorsed:) Filed Apr. 30, 1897. T. H. Ward, clerk, by E. S. Butterworth, deputy.

99 I further certify that the record in the above-entitled cause, certified by me as clerk of the supreme court of the State of California on the 24th day of April, 1897, is a full, true, and correct copy of the record and of all proceedings in the supreme court of the State of California in said cause, including the opinion of said supreme court therein and the judgment of said court in said cause, and of the register in said court in the same.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of California.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 804

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

against

FLORENCE BLYTHE HINCKLEY.

Notice Requesting Attorneys for Plaintiffs in Error to Lodge the Writ of Error with the Clerk of the Supreme Court of California, and Affidavit of Aylett R. Cotton, Jr., as to Request for Copies, with Proofs of Service.

WILLIAM H. H. HART,
Attorney for Defendant in Error.

T. B. BISHOP,
JOHN GARBER,
JOHN H. BOALT,
W. W. FOOTE,
A. R. COTTON,
Of Counsel.

Filed May , 1897.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

against

FLORENCE BLYTHE HINCKLEY.

To JEFFERSON CHANDLER, Esq., and
E. BURKE HOLLADAY, Esq.,
Attorneys for Plaintiffs in Error:

You will please take notice that, as attorney for Florence Blythe Hinckley, defendant in error above named, I have applied to the clerk of the supreme court of the State of California to certify to the clerk of the Supreme Court of the United States the record and proceedings in cause S. F., No. 98, in the supreme court of said State of California, being the appeal of Henry T. Blythe *et al.* from the decree of distribution made and entered by the superior court of the city and county of San Francisco in the matter of the estate of Thomas H. Blythe, deceased.

You are further notified that said defendant in error respectfully asks, as she has heretofore requested, that you serve the writ of error issued in the above-entitled cause by forthwith lodging the same or a copy thereof with T. H. Ward, as clerk of the supreme court of the State of California, at the office of said clerk and court, in the Parrott building,

San Francisco, California, in order that he may attach and return therewith to the clerk of the Supreme Court of the United States a certified copy of the record in said cause, S. F., No. 98.

I also respectfully ask that you deliver to me or permit me to take a copy of the petition which you presented to the Supreme Court of the United States for the writ of error in the above-entitled cause, and also of the writ and citation issued therein.

And you are further notified that on Friday, April 23, 1897, at 2 o'clock p. m., or as soon thereafter as convenient, I will apply to said clerk of the supreme court of the State of California to certify to the whole of said record and proceedings and all things concerning the same, which were commanded to be sent to the Supreme Court of the United States by the writ of error issued out of said Supreme Court of the United States on or about the 24th day of March, 1897, in the above-entitled cause, and that the certificate be made in pursuance of said writ of error and of the command thereof; of all which please take notice.

Respectfully, WM. H. H. HART,
Attorney for the Defendant in Error.

T. B. BISHOP,
JOHN GARBER,
JOHN H. BOALT,
W. W. FOOTE,
A. R. COTTON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

HENRY T. BLYTHE *et al., Plaintiffs in Error,*
against
FLORENCE BLYTHE HINCKLEY.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

William H. H. Hart, being duly sworn, on oath deposes and says that he is a citizen of the State of California and of the United States of America and over the age of twenty-five years; that affiant personally served the foregoing notice in said cause and proceedings on the 21st day of April, A. D. 1897, upon the therein-named Jefferson Chandler, one of the attorneys for said plaintiffs in error, by delivering to said Jefferson Chandler, at his office and in the presence of said E. Burke Holladay and at his office, personally, in the said city and county of San Francisco, State of California, at 9.30 o'clock a. m. of said day, a true copy of the said foregoing notice and the whole thereof, and that said Jefferson Chandler then and there read said notice in the presence of this affiant.

WM. H. H. HART.

Subscribed and sworn to before me this 23rd day of April, A. D. 1897.

[SEAL.] MARK LANE,
Notary Public in and for the City and County of San Francisco, State of California.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

HENRY T. BLYTHE *et al.*, *Plaintiffs in Error*,
against
FLORENCE BLYTHE HINCKLEY.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.:

Aylett R. Cotton, Jr., being duly sworn, on oath deposes and says that he is a citizen of the State of California and of the United States of America and over the age of twenty-one years; that on the 7th day of April, 1897, in said city and county, this affiant, upon request of Wm. H. H. Hart, Esq., and on his behalf, he being the attorney for the defendant in error in the above-entitled cause, called upon Jefferson Chandler, Esq., one of the attorneys for the plaintiffs in error in the above-entitled cause, at his office in said city, and then and there stated to said Chandler that said Hart desired to see the petition upon which the writ of error had been granted by the Supreme Court of the United States in the above-entitled cause and said writ of error, and stated then and there to said Chandler that said Hart was about to prepare a motion to dismiss said writ of error, and he desired to see said petition and writ of error before preparing the motion, and this affiant then and there stated to said Chandler that said Hart would like to be informed of the names of the plaintiffs in error in said writ. This affiant further states that the said Chandler then and there declined to permit said petition or writ of error to be seen by said Hart, and also declined to make known the names of the plaintiffs in error in said writ, and said Chandler did not then and there give any information in respect to the contents of said petition or of said writ of error. On the same day this affiant informed said Hart that said request had been made of said Chandler, and that he had declined to comply therewith.

AYLETT R. COTTON, JR.

Subscribed and sworn to before me this 24th day of April, A. D. 1897.

[SEAL.] N. E. W. SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

HENRY T. BLYTHE *et al., Plaintiffs in Error,*
against
FLORENCE BLYTHE HINCKLEY.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

J. L. Wheat, being duly sworn, on oath deposes and says that he is a resident and citizen of the city and county of San Francisco, State of California, and over the age of twenty-five years; that on the 24th day of April, 1897, in said city and county of San Francisco, he served the affidavit of Aylett R. Cotton, Jr., which is hereto attached, upon E. Burke Holladay, Esq., one of the attorneys for the plaintiffs in error in the above-entitled cause, by delivering to said Holladay personally, at his office, in said city and county, a copy of said affidavit, and that at the time of said service Jefferson Chandler, Esq., the other attorney of said plaintiffs in error, was present; that said service was made at the request of Wm. H. H. Hart, Esq., the attorney for the defendant in error in said cause.

J. L. WHEAT.

Subscribed and sworn to before me this 24th day of April, 1897.

[SEAL.] MARK LANE,
Notary Public in and for the City and County of San Francisco, State of California.

(☞ NOTE.—Originals on file.)

No. 804

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

Against

FLORENCE BLYTHE HINCKLEY.

Motion to Dismiss the Writ of Error & Motion to Affirm
Notice of Submission of Motions.
Argument on the Motions.

WILLIAM H. H. HART.

Attorney for the Defendant in Error, for the Purposes of The Motions.

JOHN GARBER,
JOHN H. BOALT,
THOMAS B. BISHOP,
W. W. FOOTE,
AYLETT R. COTTON,

Of Counsel.

Filed ..... *1897.*

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

Against

FLORENCE BLYTHE HINCKLEY.

MOTION TO DISMISS OR TO AFFIRM.

Comes now the defendant in error, by her counsel, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree which is sought to be reviewed by said writ is a judgment and decree duly made, given and entered by the Supreme Court of one of the United States, to wit: the Supreme Court of the State of California, and it fully appears from the record herein:

First. That the judgment and decree, to review which said writ of error was brought, was based and rested, in addition to other grounds, upon the ground that the plaintiffs in error were not, nor was either of them, in any wise related to or in any manner akin to Thomas H. Blythe, deceased, mentioned in the petition for said writ of error, and mentioned in said judgment and decree, and this did not involve a Federal question.

Second. That the said plaintiffs in error are not, nor is either of them, at all related to Thomas H. Blythe, deceased, or in any manner akin to him, and that it was so found and adjudged; and by reason thereof that they, and each of them, have no interest, and never had any interest, in the estate of said Thomas H. Blythe, deceased, which was distributed to the defendant in error by the decree of the Superior Court of the City and County of San Francisco, State of California, and which decree was affirmed by the judgment of the Supreme Court of the State of California, and of which judgment said plaintiffs in error complain.

Third. That no Federal question was involved in the proceedings in which said decree of distribution was made, nor in the said judgment of the Supreme Court of the State of California affirming said decree of distribution, nor in any judgment or proceeding sought to be reviewed under said writ.

Fourth. That the question of alleged kinship of said plaintiffs in error, and of each of them, to Thomas H. Blythe, deceased, and of their alleged right to his estate, and of the kinship of the defendant in error, Florence Blythe Hinckley, to said Thomas H. Blythe, deceased, and her right to his estate, were involved and determined in the proceedings in the case entitled, "In the matter of the estate of Thomas H. Blythe, deceased, Florence Blythe *vs.* Abbie Ayres et al.," disposed of and decided by the said Superior Court of the City and County of San Francisco, State of California, on the 22d day of October, 1890, and affirmed against the plaintiffs in error by the Supreme Court of the State of California on the 24th day of April, 1894, and that no writ of error was applied for or issued to review said decision or the judgment and decree rendered therein within two years after the said 24th day of April, 1894, or at any time or at all.

Fifth. It does not appear from the record in this cause that the decision or judgment and decree of the State court complained of was or is repugnant to the constitution, or to any treaty, or to any law, of the United States.

Sixth. It does not appear from the record in this cause that said plaintiffs in error, or any of them, claim any right, or title, or privilege, or immunity, under the constitution of the United States, or under any treaty or law of the United States.

Seventh. Because the record in said cause fails to show that said plaintiffs in error claim, or that either of them claims, that there is any conflict between any law of the State of California and the constitution, or any law or treaty, of the United States in reference to the subject matter of litigation, or the right of the parties thereto.

Eighth. It fully appears from the record herein that Thomas H. Blythe, at and before the time of his death, was a resident and citizen of the State of California, and that by reason thereof the right of the defendant in error to succeed to his estate was and is wholly governed by the laws of said State then in force, and that no Federal question was or is involved in the proceeding in relation thereto, and that the right of said defendant in error to succeed to his property depended

upon the construction of a State statute, and that the decision of the Supreme Court of the State of California upon that question is conclusive upon this court.

And the said defendant in error, by her counsel as aforesaid also moves the court to affirm the judgment and decree to review which, said writ of error was herein brought, although the record in said cause may show that this court has jurisdiction in the premises, for the following reasons:

1st. Because of each and all of the reasons and grounds as above specified.

2d. That it is manifest from the record herein that the reasons assigned for taking of the writ of error were and are frivolous and that it was taken for delay only.

WILLIAM H. H. HART.

Attorney for the Defendant in Error, for the Purposes of These Motions.

~~JOHN GARBER~~,
JOHN H. BOALT,
THOMAS B BISHOP, W. W. Foote,
AYLETT R. COTTON,
John Garber *Of Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET. AL., PLAINTIFFS IN ERRROR,

Against

FLORENCE BLYTHE HINCKLEY.

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND AFFIRM.

TO MESSRS. JEFFERSON CHANDLER AND E. BURKE HOLLADAY, ATTORNEYS FOR PLAINTIFFS IN ERROR:

Please take notice that on Monday, the 10th day of May, A. D. 1897, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States at the court-room of said court, in the Capitol Building, in Washington, D. C., for the decision of said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

WILLIAM H. H. HART.
Attorney for the Defendant in Error, for the Purposes of These Motions.

~~JOHN GARBER~~,
JOHN H. BOALT,
THOMAS B BISHOP, W. W. Foote,
AYLETT R. COTTON,
John Garber *Of Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

Against

FLORENCE BLYTHE HINCKLEY.

Argument of Florence Blythe Hinckley, the Defendant in Error, in Support of Motion to Dismiss the Writ of Error Issued Herein, and in Support of Motion to Affirm.

STATEMENT OF THE CASE.

We have not specifically named each plaintiff in error for the reason that the original or a copy of the petition for the writ issued in this cause, has not been filed in the office of the Clerk of this court, nor served upon the Clerk of the Supreme Court of the State of California; and a copy of the petition, as well as the names of said plaintiffs in error, having been refused by the attorneys for the plaintiffs in error, we have adopted the above title, which is in accordance with the memorandum furnished by the Clerk of this court.

We have not been able to secure a copy of the petition presented praying for the issuance of a writ of error in this cause, but we understand that the position assumed by the plaintiffs in error is that the defendant in error, having been born in England and remaining there until after the death of Thomas H. Blythe, deceased, was an alien, and by reason of alienage could not inherit or succeed to his estate within the State of California, and that her right to succeed to said estate must be provided for by a provision of the treaty between Great Britain and the United States, in force at the time of the death of Blythe, and that the laws of California in reference thereto allowing her to so succeed to said estate are invalid and inoperative, they claiming that the treaty is silent upon that subject; but whatever position may be taken by the plaintiffs in

error is immaterial, as the record in this case and a statement of facts which is borne out by the record as hereinafter set forth will, we think, dispose of this case upon the defendant's motion to dismiss, and to affirm, for the reasons therein specified.

In the administration of an estate under the laws of California, the court in which the administration is had determines who is the heir, or are the heirs, of the decedent, and entitled to the estate, real as well as personal, and makes a decree distributing the estate to the person or persons inheriting the same; and under *Section 1664 of the Code of Civil Procedure of California*, which section has been in force since the 18th day of March, 1885, a proceeding may be instituted in connection with the administration of an estate, when one year has elapsed after the issuing of letters of administration, and prior to the time the estate is ready for distribution, to obtain judgment and decree of the court determining the heirship to the estate and the right to distribution of the same; and that section makes such judgment and decree conclusive of the right to the estate when application is made for distribution.

The following is a copy of that section:

"SECTION 1664. In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainty to a common intent, and requiring all said persons, and all persons named or not named having or claiming

any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action, upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property. The court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the court and in the register of the proceedings of said estate. And the court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the Su-

preme Court; and the provisions in this code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties, or the attorneys of the parties, so appearing in said proceeding. The court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this section shall be apportioned in the discretion of the court. In any proceeding under this section, the court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provision of this section; but where such questions shall have been litigated, under the provisions of this section, the determination thereof as herein provided shall be conclusive in the distribution of said estate."

In the matter of the administration of the estate of Thomas H. Blythe, deceased, in the Superior Court of the City and County of San Francisco, State of California, and after more than one year had expired from the issuing of letters of administration on the estate, and on the 1st day of October, 1885, a proceeding was instituted on behalf of the defendant in error in this case, by her guardian, she then being a minor under eighteen years of age, and her name then being Florence Blythe, to have the heirship of said estate and the right to distribution thereof adjudged under said section 1664, Code of Civil Procedure, it being claimed in said proceeding that she is the sole heir of Thomas H. Blythe, deceased, and entitled to distribution of the whole of his estate. All steps necessary to give the court jurisdiction were taken. (See Finding IX, contest under section 1664, C. C. P., pages 17–20, State Record. Note—The paging of that record is adopted in all references herein.) Among the parties who appeared to contest her claim were the plaintiffs in error in this case. (Page 11, State Record.) She, by her guardian, filed a complaint in that proceeding, setting forth the facts constituting her claim to the estate (finding IX, p. 20, State Record), and the plaintiffs in error in this case filed their answer to the complaint controverting her claim. (Page 11, State Record,)

An answer was also filed to the complaint by Elizabeth Powell, Sarah Roberts, John Barnes, Joseph Barnes, Sarah Foulkes, Thomas Hughes, Sarah Ann Hughes, John Williams, Charles Williams, Thomas Williams, Edward Williams, Mary Platt, Margaret Williams and Margaret Williams, widow of Ebenezer Williams, deceased, Ann Ruth Williams, John Charles Williams and Margaret May Williams, who were known in said proceeding as the "Williams Claimants" or "Williams Heirs," and they asserted that they are the next of kin and heirs of Blythe, and entitled to his estate, and the court found that they were related to Thomas H. Blythe, as stated in their answer, but that the defendant in error was entitled to inherit as against them. (See Findings XVIII and XXII, pages 32 and 33, State Record, and Findings VII and VIII, page 16, State Record

Answers were also filed to said complaint by seventeen other groups of claimants, each set alleging that they are Blythe's heirs, and in each of these answers he was given a different father and a different mother. This man, who was known in California as Thomas H. Blythe, came from Eng-

land to California in 1849; there was much mystery surrounding his origin and true name, and this gave rise to these various groups of claimants, each asserting that he was of their family. One set alleged his name was Williams, other sets that his name was Savage, and several different families of Blythe claimed that he was their kinsman and that his name was Blythe. The members of one of these families conveyed their claims to a corporation, known as "The Blythe Company," and this corporation was one of the contestants for the estate. (Finding XI, page 73, State Record.) These groups were not related to each other.

After a protracted trial the court decided in favor of Florence Blythe, the defendant in error herein, and the court made and signed written findings (pages 11 to 33 inclusive, State Record), in which it was found that she was and is the child of Thomas H. Blythe and Julia Perry (finding X, pages 20, 21), and born in England, and remained there until after his death (finding I, page 12); that he had no other offspring; that he left surviving him no wife (findings VII and VIII, page 16; and in said findings the court found that said Elizabeth Powell, Sarah Roberts, John Barnes, Joseph Barnes, Sarah Foulkes, Thomas Hughes, Sarah Ann Hughes, John Williams, Charles Williams, Thomas Williams, Edward Williams, Mary Platt, Margaret Williams, Margaret Williams, widow of Ebenezer Williams, deceased, Ann Ruth Williams, John Charles Williams, and Margaret May Williams (known in the proceedings as the "Williams Claimants"), were and each of them is related to Thomas H. Blythe, deceased, as in their answer alleged, and that his true name was Thomas Williams (finding XVIII, page 32); *and that none of the other defendants in said proceeding (including said plaintiffs in error) was, nor is any of them, in any wise related to, or in any manner akin to, said Thomas H. Blythe, deceased* (finding XX, page 33); and said court in said proceeding, on the 22d day of October, 1890, rendered judgment, whereby it was adjudged and decreed that said Florence Blythe was and is the only child and daughter of said Thomas H. Blythe, deceased; that she is the sole owner of all his estate, of every name, nature and description, wherever situate; and that she is the sole surviving and only lawful heir of said Thomas H. Blythe, deceased, and is the only person entitled to have and receive distribution of his estate (pages 34–36); and further adjudging and decreeing that all the defendants in

said action (which included plaintiffs in error herein), and all persons known or unknown, other than said Florence Blythe, are not, nor is any of them, entitled to distribution, in whole or in part, of any of the estate of said Thomas H. Blythe, deceased; nor are they, or any of them, heirs or any heir of said Thomas H. Blythe, deceased; nor have they, or any of them, any ownership of or interest in any of the estate of said Thomas H. Blythe, deceased (page 35).

Said Elizabeth Powell and co-claimants, the so called "Williams Claimants," appealed from said judgment and decree to the Supreme Court of the State of California, and the case was decided November 30th, 1892, the judgment of the Superior Court in favor of defendant in error herein being affirmed, and the case is reported as *Blythe* vs. *Ayres*, in 96, Cal. 532-595.

(See also Finding V. on Distribution, pages 69-70.)

The Superior Court having found and decided that the persons known as the "Williams Claimants" were the only relatives of Blythe other than the defendant in error, it became a very important question on that appeal, whether, under the statutes of California and the facts as found by the Superior Court, Blythe's estate was inherited by her, or by the "Williams Claimants," as they would have taken the estate if the Supreme Court had held that the law was against her. All the other claimants who made a contest for the estate in said proceeding, including the plaintiffs in error in this case, having been found and adjudged by the Superior Court not to have been related to Thomas H. Blythe, they could not, in any event, have taken the estate.

Subsequently, the plaintiffs in error in this case appealed to the Supreme Court of California from said judgment and decree of the Superior Court rendered October 22d, 1890, and the same was affirmed April 24th, 1894. (Page 70, State Record.) "The Blythe Company" above mentioned took a separate appeal from that judgment and decree, and also from the order denying a new trial (appeals numbered 15,411, 15,528), and several other sets of the claimants took separate appeals from that judgment, and from orders denying new trials. All of these appeals were determined by said Supreme Court on the 24th day of April, 1894, by affirming the judgment and decree of said Superior Court. The Supreme Court only filed an opinion in the appeals of "The Blythe Company," reported in 102 Cal., 254–264, as *Blythe* vs. *Ayres*, and in each of the other appeals, eight in number, including

the appeal of the plaintiffs in error in this case, the judgment was affirmed on the authority of the said case of *Blythe* vs. *Ayres*, 102 Cal., 254 These eight cases are mentioned in 102 Cal. among the unreported cases as being affirmed on the authority of that case; and it appears from pages 255 and 256 of 102 Cal. that the attorneys for the appellants in the other cases,including Messrs. S. W. and E. B. Holladay for Henry T. Blythe et al., who are the plaintiffs in error in this case, participated in the argument, and it is said in the court's opinion, page 256, that, "A number of other appeals taken by various other defendants, were argued and submitted at the time of the argument and submission of said appeals Nos. 15 411 and 15,528 (appeals of The Blythe Company), and said other appeals will follow and be determined by the conclusions arrived at in this present opinion." It is further stated in the opinion, page 257, "that *the fact being established and unassailed that none of the defendants except the Williams claimants are in any wise related to, or in any manner akin to, said Thomas H Blythe, deceased*", the appellant is in no position to inquire about any errors which the trial court may have committed in arriving at the conclusion that the respondent (Florence Blythe) is the rightful heir and entitled to the estate. Appellant's predecessors based their right to contest for the estate upon their certain alleged kinship to the deceased; but when it appears by an unchallenged finding that there is no such kinship, what, asks the respondent, does it matter to appellant where the estate goes, and how can it be prejudiced or aggrieved by any ruling made by the court in favor of another claimant? We confess that we can see no successful answer to this contention."

These observations of the court applied alike to the plaintiffs in error in this case, who had also been found and adjudged not to be related to Blythe, and therefore could not be concerned in any question as to who was the rightful heir of Blythe or entitled to his estate.

On the 18th day of June, 1894, the defendant in error in this case, whose name by reason of marriage was then Florence Blythe Hinckley, made application by her petition to said Superior Court praying distribution to her of the share of the estate of Thomas H. Blythe, deceased, to-wit, the whole thereof, to which she was entitled as his sole heir, and based her application in said petition upon said judgment and decree, made on the 22d day of October, 1890, in said proceeding, in which it was determined and adjudged that she was the sole

heir of said Thomas H. Blythe, and entitled to have distribution of his estate; and in said petition there was set forth the said proceeding and said decision and said judgment and decree therein; and it was alleged in the petition, that she is the only child of said Thomas H. Blythe, deceased; his only heir; the sole owner of his estate, and the only person entitled to have and receive distribution thereof. Said petition sets forth in full the findings and the judgment and decree of October 22d, 1890, in said proceeding under said section 1664. (See State Record, pages 3–30.)

The said "Williams claimants," who would have been the heirs of Blythe had the defendant in error not been, offered no obstruction to the making of distribution to her, and they submitted to the said judgment and decree made on the 22d day of October, 1890, and which was affirmed by the Supreme Court of California, which judgment and decree, according to the provisions of said section 1664 of the Code of Civil Procedure of California, was conclusive of the right of the defendant in error herein to have the estate of Blythe distributed to her; but the plaintiffs in error in this case, who, by said judgment and decree had been found and adjudged not to be related to said Blythe, and therefore could not possibly be entitled to distribution of any of his estate, and although that decree had been affirmed against them by the Supreme Court of California, filed an answer to her said petition, wherein and whereby they denied that the judgment and decree of October 22, 1890, had been entered, or that the time for appeal therefrom had expired; and they again by said answer undertook to re-litigate the question of heirship of said defendant in error and of themselves by denying that she was the heir at law and next of kin of Thomas H. Blythe, deceased, and by asserting that they were his heirs and next of kin, and claiming that the right to distribution had been suspended for the reason that an appeal taken by another claimant, Alice Edith Blythe, was pending. No other question was raised by said answer, as will fully appear from pages 41–43 of the State Record.

Upon the hearing of that petition, and said answer thereto, the court found that said judgment and decree had been made on the 22d day of October, 1890, in said proceeding under said section 1664, and that thereby it was adjudged and decreed that the defendant in error, whose name was then Florence Blythe, is the sole owner of all the estate of said Thomas H. Blythe, deceased, and his only lawful heir, and

the only person entitled to have and receive distribution of his estate (finding IV., pages 63–69); and also found that the plaintiffs in error herein appealed from said judgment to the Supreme Court of California, and that said Supreme Court, on the 24th day of April, 1894, gave judgment affirming said judgment (finding V., page 70); *and said Superior Court also found that the plaintiffs in error in this case "are not, nor is any of them, in any wise related to, or in any manner akin to, the said Thomas H. Blythe, deceased*, nor are they heirs, nor is any one of them an heir, of said deceased, nor have they, nor any one of them, any ownership of, or interest in, or claim to, any of the estate of said Thomas H. Blythe, deceased" (finding VI., pp. 71–72); and said Court, on said 26th day of October, 1894, in said application for distribution, gave judgment, ordering, adjudging and decreeing that all the property of said Thomas H. Blythe, deceased, of every name, nature, and description, wherever situated, with the exception of the money then in the hands of the administrator of said estate, be and was thereby allowed and distributed to said Florence Blythe Hinckley, the defendant in error in this case. (Pages 77–79.)

Said application for distribution was made under sections 1658–1663 of the Code of Civil Procedure of the State of California which authorize the distribution of an estate in part in advance of the final closing of the estate.

From that judgment and decree of distribution the plaintiffs in error in this case appealed to the Supreme Court of the State of California, the case being entitled "In the Matter of the Estate of Thomas H. Blythe, deceased, Henry T. Blythe et al., appellants, and is reported in 110 Cal., 229–231. The Supreme Court, on the 30th day of November, 1895, affirmed said decree; and it is this judgment and decree of the Supreme Court affirming the decree of distribution, that the plaintiffs in error seek to have reviewed under the writ of error.

Various errors were assigned in that case, but on the hearing of that appeal in the Supreme Court, the only questions presented were upon the rulings of the lower court admitting certain evidence on behalf of the respondent, the defendant in error herein, and in sustaining an objection to the offer of the appellants, the plaintiffs in error herein, to prove that the said judgment of October 22nd, 1890, had never been entered in the judgment book, it being held by the State Supreme Court that it had been properly entered.

That it may be seen just what was decided on that appeal, we here insert a complete copy of the report in that case, taken from 110 Cal., 229–231, which is as follows:

"(S. F. No. 98. In Bank.—November 30, 1895.)

"In the Matter of the Estate

of

"THOMAS H. BLYTHE,

Deceased.

"HENRY T. BLYTHE et al.,

Appellants.

"*Estates of Deceased Persons—Proceedings to Determine Heirship—Entry of Final Decree.*

"The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship, is properly entered when spread at length upon the minute book of the court in probate. It is not necessary that it should be entered in a judgment book.

"Appeal from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person, and from an order refusing a new trial. J.V. Coffey, Judge.

"The facts are stated in the opinion of the court.

"S. W. & E. B. Holladay, for Appellants Henry T. Blythe et al.

"W. H. H. Hart, and Garber, Boalt & Bishop, for Respondent.

"Henshaw, J.—This is an appeal by Henry T. Blythe and others from the decree of distribution in the matter of the above-entitled estate.

"The petition for distribution was presented by Florence Blythe. She averred as the foundation of her claim, the decision and judgment made in the matter of said estate in the proceeding entitled *Florence Blythe* v. *Abbie Ayres et al.* These appellants appeared, joined issue with the petitioner, and pleaded *nul tiel record.*

"Upon the hearing, the decision of the court, as entered in the probate minute-book upon October 22, 1890, was offered and admitted in evidence over the objection of appellants. Appellants, in turn 'offered and demanded that they be permitted to prove that no such judgment existed against them as is alleged against them in the said petition for distribution, because the said judgment (rendered October 22, 1890, in the action or proceeding of *Florence Blythe* v. *Abbie Ayres et al.*), had never been entered in the judgment-book; the time to appeal from said judgment had never arrived; the said judgment had never been entered; the action or proceeding was still pending; the alleged appeal taken by Henry T. Blythe et al., as from said judgment, was taken by inadvertence, under the impression that said judgment had been entered, and without the knowledge of said parties or their attorneys of the nonentry of said judgment; that said Henry T. Blythe et al. were parties defendant in said action or proceeding and were making a *bona fide* claim to the heirship and ownership of said estate; that said alleged appeal of Henry T. Blythe et al., as from said judgment, was futile; that the action of the Supreme Court, as in affirming said judgment, was without jurisdiction and void; that its remittitur to the Superior Court certifying its said action was void; that said remittitur was never attached to the judgment-roll, and no minute of said affirmance of the Supreme Court was ever entered on the docket of said Superior Court.' The court sustained the objection of petitioner to this offer. The offer, it will be observed, was to show that the alleged judgment did not exist *because* it had never been entered in the judgment-book. No claim was made by petitioner that it had been so entered. Indeed, petitioner rested her cause upon the affirmative showing that entry had been made in the minute-book.

"That this entry was sufficient has thrice been decided in the matter of this estate. (*Blythe* v. *Ayres*, ante, p. 227.) There was thus before the court an affirmative showing of a sufficient entry. For appellants to have proved that it was not entered in some other book could not have advantaged them, and the refusal of the court to allow them to make such proof could not have injured them.

"The decree and order appealed from are affirmed.

"The order of this court, made upon application of appellants herein restraining the probate court from proceeding further in the matter of distribution of said estate, is also vacated and dissolved.

"McFarland, J., Van Fleet, J., Garoutte, J., and Temple, J., concurred."

The question as to whether the defendant in error herein was entitled to inherit, although she was born in England and resided there until after her father's death, was raised and fully determined in the case of Blythe *v.* Ayres, 96 Cal., page 532, opinion pages 557 *et seq.*; and as against the plaintiffs in error, was fully determined and disposed of in their above mentioned appeal, and which appeal is also mentioned in Finding V, page 70, of the State Record; and the question of her alienage, if any, was then involved and disposed of, and no writ of error was taken in reference to said judgment and decree of the Supreme Court of the State of California upon that subject within two years from the affirmance of that decree, to-wit, within two years from the 24th day of April, 1894, and by reason thereof the plaintiffs in error herein are estopped to raise that question upon the writ of error issued in this cause. The question of the alienage of the defendant in error herein was not raised in the proceeding for distribution to review which the writ of error is taken in this case.

ARGUMENT.

I. *Ample ground for dismissing, for want of jurisdiction, the writ of error issued in this case, appears in the decision of the Superior Court in the proceeding under section 1664 of the Code of Civil Procedure of California, as well as in the decision in said application for distribution, in both of which decisions it was found and adjudged, as above stated, that the plaintiffs in error in this case were not related, nor was either of them related, to said Thomas H. Blythe, deceased.*

The court having thus determined that they were not related to said Blythe, they could not have any interest in the controversy over his estate, nor any standing to dispute the claim of any other party; and the decision of the court against them was inevitable.

We respectfully submit that had it been disclosed to this Honorable Court in the petition for the writ of error, that the state court had twice found and adjudged in proceedings to which the plaintiffs in error were parties, that they were in no wise related to Blythe, and therefore could not possibly inherit his estate, the writ would not have been granted, and that it is only necessary to bring the facts to the attention of this Honorable Court to have the writ summarily dismissed.

The judgment against the plaintiffs in error can be maintained upon the ground that they were not related to said

Thomas H. Blythe, and, consequently, could not be his heirs or inherit his estate, regardless of any other question; and had there been a Federal question involved that would not prevent the dismissal of the writ of error.

In *Seneca Nation of Indians* vs. *Christy*, 162 U. S., 283, where the decision of the state court was based, besides other grounds, upon the bar of the statute of limitations, it is said in the opinion, pages 289–290: "As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well-settled rule on that subject and cannot be maintained. *Eustis* vs. *Bolles*, 150 U. S., 361; *Gillis* vs. *Stinchfield*, 159 U. S., 658."

It is also held by this court in the case of the *State of California* vs. *Holladay*, decided November 11, 1895, and reported December 2, 1895, in the Opinions of the United States ~~Circuit~~ Supreme Court, No. 2, page 91, that the Supreme Court of the United States "will not review a State judgment unless a Federal question has been decided by that court against the plaintiffs in error, nor even when a Federal question has been decided, if, also, another question not Federal was decided by the State court which was broad enough to maintain its judgment."

It was also held by this court in the case of the *Rutland Railroad Co.* vs. *Central Vermont Railroad Co.*, 159 U. S., page 630, opinion bottom of page 640, that "It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question. *Murdock* v *Memphis*, 20 Wall., 590; *Jenkins* v. *Loewenthal*, 110 U. S., 222: *Beaupre* v. *Noyes*, 138 U. S., 397; *Walter A. Wood Co* v. *Skinner*, 139 U. S., 293; *Hammond* v. *Johnston*, 142 U. S., 73; *Tyler* v. *Cass Co.*, 142 U. S., 288; *Delaware Co.* v. *Reybold*, 142 U. S., 636; *Eustis* v. *Bolles*, 150 U. S., 361; in the last two of which many other cases to the same effect are cited."

This court also held in the case of the *Missouri Pacific Railway Co.* vs. *Fitzgerald*, 160 U. S., 556, opinion 576, as follows:

"We repeat what we said in *California Powder Works* v. *Davis*, 151 U. S., 389–393, that 'It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest

court of a State in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.' *Eustis* v. *Bolles*, 150 U. S., 361, and cases cited."

II. Sections 671 and 672 of the Civil Code of California, which have been in force since prior to the time Thomas H. Blythe died, give non-resident aliens the right to inherit property in California.

The following is a copy of those sections:

"Sec. 671. Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this State."

"Sec. 672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title 8, Part 3, of the Code of Civil Procedure."

These sections have been held by the Supreme Court of the State of California to be valid and not in conflict with the constitution of that State.

The constitution, Section 17, Art. 1, provides that:

"Foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native born citizens."

In respect to that provision of the constitution and section 671 of the Civil Code, it is said by Justice McKinstry, in *State* vs. *Smith*, 70 Cal., 153–155: "The constitution (Art. 1, Sec. 17) prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property.

"There is no provision of the constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of this state.

"Section 671 of the Civil Code provides: 'Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.'

"It is suggested that inasmuch as laws can have no extra-territorial operation, the legislature has no power to provide for succession by foreigners who have never been residents. But the section of the code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction.

"Section 672 of the Civil Code reads:

"If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title 8, Part 3, of the Code of Civil Procedure.

"The words 'non-resident alien' are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the state.

"All aliens take by succession. (Civ. Code, sec. 671.)

"The failure of a non-resident alien to 'appear and claim' within five years after descent cast operates a bar of his right to assert any title in the property as against the state."

That was a suit brought by the Attorney General in the name of the state to declare the estate of John Smith escheated on the ground that his next of kin, to whom the estate had been distributed, were non-resident aliens at the time Smith died. The court decided they could take and hold the property.

In Estate of Billings, 65 Cal., 593, it was also decided that the provisions of section 17, article 1 of the constitution do not inhibit legislation extending the right of inheritance to non-resident alien heirs, and that under the provisions of the codes, non-resident alien heirs are entitled to share in the estate of an intestate equally with heirs of the same degree residing in the state.

The right of an alien to inherit real and personal property in the State of California under section 671 of the Civil Code, was also sustained in *Lyons* vs. *State of California*, 67 Cal., 380.

The statute as originally enacted in California, April, 19, 1856 (Statutes of 1856, 137), provided that "Aliens shall hereafter inherit, and hold by inheritance real and personal estate, in as full a manner as though they were native born citizens of this or the United States."

In *State of California* vs. *Rogers, Adm'r., Etc.*, 13 Cal., 160, decided by the Supreme Court of that state in April, 1869, it was contended on behalf of the state that the above mentioned clause of the constitution is restrictive as well as enabling, and that its terms exclude any other rights or privileges to aliens than those given, but the court say in the opinion, "We think this view erroneous. The constitution is not a grant of power or an enabling act to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference.

"The object of this provision was to secure a certain protection to such resident aliens as might be in the state at the time of a descent, but this short sentence was not designed to comprehend all the law in respect to aliens. The legislature could not, indeed, abridge this privilege, but it was not disabled from extending it or adding other privileges. It might as well be urged that because the constitution provided that no law should be passed impairing the obligation of contracts, no legislative regulation could be had; or, because a homestead was exempted from forced sale, there could be no exemption of other property. The alien is secured by the constitution in this one privilege, but he may be secured by the legislature in as many more as it chooses to give, provided there is no conflict with any constitutional restrictions upon its power; of which this provision is not one."

That was ~~only~~ also a suit instituted by the Attorney General on behalf of the state to have the property adjudged escheated to the state, because those who would otherwise be entitled were non-resident aliens.

In the Statutes of 1856, as well as in section 672 of the Civil Code, there is a provision requiring the alien to appear and claim the property within five years from time of the succession.

In this case the defendant in error appeared and claim was made on her behalf to the estate of Blythe within much less than five years after his death. (Finding I., p. 61. Finding IV., p. 63, State Record.)

Blythe died April 4th, 1883 (finding I., p. 61, State Record); she appeared and claimed the estate October 1st, 1885. (Finding IV., p. 63, same record.)

We presume, however, that counsel for plaintiffs in error may rely upon the following cases decided by the Supreme Court of the State of California, to wit: *Farrell* vs. *Enright*, 12 Cal., 450; *Siemssen et al.* vs. *Bofer*, 6 Cal., 250.

But an examination of these cases will disclose that at the time of the death of the parties whose estates were involved therein, the common law was in force. In the former case Enright died in April 1850; in the latter case the parties claimed as heirs of Henry Hyer, who died in San Francisco in 1853. The death of each party whose property was in controversy in these cases occurred previous to the act of the Legislature of the State of California, passed April 19, 1856, entitled "An Act relative to Escheated Estates" (Statutes of 1856, page 157), and in the case of *People* vs. *Rogers*, 13 Cal., on page 165, the Supreme Court of California say that the descent was cast prior to the Act of 1856, and that act was not involved in the decision of *Farrell* vs. *Enright*.

III. Whether the State court decided correctly in regard the right of non-resident aliens to inherit property situated in California is not a Federal question.

The ruling of a State court that a State law does not violate the State constitution, is conclusive upon the Supreme Court of the United States. *Gut* v. *Minnesota*, 9 Wall., 35.

"The rule of construction adopted by the highest court of the State in construing their own constitution, and one of their own statutes, in a case not involving any question re-examinable in this court under the 25th Section of the Judiciary Act, must be regarded as conclusive in this court." *Provident Savings Inst.* vs. *Mass.*, 6 Wall., 611, citing *McCutchen* vs. *Marshall*, 8 Pet., 240; *Bank of Hamilton* vs. *Dudley*, 2 Pet., 499; *Leffingwell* vs. *Warren*, 2 Black, 599.

It is said in the opinion in *Elmwood* v. *Marcy*, 2 Otto, 289, "We have always followed the highest court of the state in its construction of its own constitution and laws."

In *Chambers Co.* vs. *Clews*, 21 Wall., 317, it was held, that the decision of the Supreme Court of Alabama upon the constitutionality of an act of the legislature authorizing the issuing of certain bonds, was binding upon the Supreme Court of the United States.

Whether the statutes of a state have been duly enacted in accordance with the requirements of the constitution of such state, is not a Federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States. *Leeper et al.* v. *State of Texas*, 139 U. S., 462.

Alleged errors of the state court, which involve questions either of fact or of state, and not federal law, are not reviewable in the United States Supreme Court on writ of error. *Quimby et al.* v. *Boyd et al.* 128 U. S., 488.

The United States Supreme Court has no jurisdiction of the question whether a state act is consistent with the constitution of the state. *Medberry* v. *Ohio*, 24 How., 413. *Salomon* v. *Graham*, 15 Wall., 208.

A question of state law alone does not present a federal question so as to give the Supreme Court of the United States jurisdiction over a state judgment. The judgment of the state court is final. *Nonconnah Turnpike Co.* v. *Tennessee*, U. S. *Palmer* v. *Marston*, 14 Wall., 10. *Sevier Adm'r* v. *Haskell*, 14 Wall., 12.

A controversy, where no right is claimed under the constitution or laws of the United States, but which depends on state laws and proceedings, is exclusively within the jurisdiction of the state court. *Congdon* v. *Goodman*, 2 Black, 574.

IV. The United States Government has not made any treaty or passed any law, and there is no provision in the United States constitution, prohibiting a state from granting to a non-resident alien the right to inherit land within the state; hence, a state statute granting such right is not in conflict with any treaty or law of the United States nor with the constitution of the United States.

There is no doubt that if there were a treaty existing between the United States and a foreign country, providing that any citizen of the foreign country might take in any of the United States by succession as heir, that such a provision in a treaty would have the effect to suspend a state statute, or the rule of the common law, prohibiting such citizen of the foreign country from inheriting; and upon this point we would call the court's attention to the case of *Hauenstein* v. *Lynham*, 100 U. S. 483, and the case of *Geofroy* v. *Riggs*, 133 U. S. 258–266. It is stated in the latter case, page 267, "the treaty being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differed from them."

It is further said in that opinion, p. 267, that "The treaty expired by its own limitation in eight years, pursuant to an article inserted by the Senate. 8 Stat. 192. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration, that right was limited as provided by the statute and common law of Maryland, as adopted by Congress on the 27th day of February, 1801, until the convention between the United States and France was concluded, February 23, 1853"

Here is a clear recognition of the power of the state to regulate the descent of property in the absence of any treaty with a foreign country on that subject.

It is mentioned in the case of *Geofroy* v *Riggs*, page 265, that the act of Maryland, of December 19th, 1791, provided that a foreigner might, by deed or will thereafter made, take and hold lands within the state in the same manner as if he were a citizen thereof, and that the lands might be conveyed by him, and transmitted to and inherited by his heirs and relations as if he and they were citizens of the state.

In *Spratt* vs. *Spratt*, 1 Peters, 343, that act of Maryland was held to enable a foreigner to take land by inheritance in the same manner as if he were a citizen, thus recognizing the power of the state to legislate on that subject.

In *Hauenstein* vs *Lynham*, *supra*, this court, at the bottom of page 484, held "the law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sec. 114. In our country this authority is primarily in the states where the property is situated."

V. Thomas H. Blythe was a citizen of the United States, a citizen and resident of the State of California, and the authorities agree upon the proposition that an illegitimate child, wheresoever born or residing, possesses the capacity to be legitimated, according to the law of the country of the domicile of the father. *Munro* v. *Munro*, 7 Clark and Finnely's Reports, 842; the case *In re Wright's Trust*, 2 Kay and Johnson's Reports, 607; *Dicey on Domicile*, pages 5, 6, 72, 97, 182, 186; *In re Don's Estate*, 4 Drewry's Reports, 194; *Bar's International Law*, section 102; *Westlake's Private International Law*, page 35; *In re Grove-Vaucher* v. *The Solicitor to the Treasurer*, L. R. 40 Ch. Div., 216–232; and *Schouler's Domestic Relations*, section 231; *Blythe* v. *Ayres*, 96 Cal., 532.

But we do not understand, however, that it is necessary to discuss any of these questions with the plaintiffs in error, who are not Blythe's kindred, and who cannot therefore dispute the defendant in error's right to his estate.

VI. If it were a federal question whether a state could give non-resident aliens the right to inherit land within the state, no such question was raised in any form in the proceeding on distribution, sought to be here reviewed.

The following is from the opinion in *Blount* v. *Walker*, 134 U. S., 607–614. "To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *New Orleans Water Works Co.*, v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 29; *Klinger* v. *Missouri*, 8 U. S. 13 Wall., 257–263; *De-Saussure* v. *Gaillard*, 127 U. S. 216; *Hopkins* v. *McLure*, 133 U. S. 380."

VII. The judgment which was rendered as above stated on the 22d day of October, 1890, by the Superior Court of the City and County of San Francisco, in the proceeding under said section 1664, *in and by which it was decided and adjudged that the plaintiffs in error in this case were not related to Thomas H. Blythe*, and not entitled to any of his estate, and that the defendant in error herein was and is his sole heir and entitled to distribution of his estate, was affirmed by the Supreme Court of the State of California, on the 24th day of April, 1894, against the plaintiffs in error in this case, and more than two years prior to the application for the writ of error. It is too late to apply to this court for a writ of error to review that judgment, and as long as that judgment stands, the plainiiffs in error are debarred of any claim to the estate of Blythe.

Therefore, the plaintiffs in error are not entitled to be heard at all upon any question concerning Blythe's estate nor the distribution of the same. The judgment of the Supreme Court of California, of April 24th, 1894, affirming the judgment of the Superior Court which established that they are not Blythe's relatives or heirs, cannot be reviewed under the writ of error in this case, and that judgment bars the plaintiffs in error of any claim to Blythe's estate.

The making of the decree of distribution in favor of the defendant in error was merely carrying out the decision made in said proceeding under said section 1664, and formally distributing to her the estate which the court in that proceeding had adjudged to be hers, and not to belong to these plaintiffs in error or to any of the other contestants in that proceeding.

Therefore, the attempt by them to obstruct the distribution of the estate to the defendant in error when she petitioned for distribution, was without any right on their part, and in disregard of the judgment both of the Superior Court and of the Supreme Court of California in that proceeding.

We respectfully submit, that when it appears to this Honorable Court that the plaintiffs in error have asked a writ of error to review a decree of distribution founded upon a judgment which has stood against them since October 22, 1890, whereby they were pronounced and adjudged not to be the heirs of Blythe nor in any manner related to him, the want of jurisdiction in this case will be quite apparent.

VIII. This Honorable Court has explicitly decided that a State has power to control the tenure of real estate within its limits, the mode of its acquisition and transfer and the rules of its descent.

The following is from the opinion in *United States* v. *Fox*, 94 U. S., 315–320:

"The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat., 210. The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes

for which the Federal government was created, and would seriously embarrass the landed interests of the State" (pp. 320–321).

The said case of *United States* v. *Fox* is approved in the opinion in *Arndt* v. *Griggs*, 134 U. S., 316–321, in passing upon the power of a State to provide for the bringing of parties into court by publication to quiet title to real estate in a suit in equity.

The rule referred to in *United States* v. *Fox*, 94 U. S., 315–321, declaring it to be "an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated," is re-stated in *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S., 65–68, and it was there held, that, as Congress had not used words indicative of intent that the law of the state should not be followed as to who should be the heirs of a decedent and have the benefit of a pre-emption location made by him, the law of the State of Kansas, having permitted illegitimate children, recognized by the father in his lifetime, to inherit from him as his heirs, such children would be regarded as heirs within the meaning of Rev. Stat., Sec. 2269, giving heirs the benefit of a pre-emption location made by the father.

In deciding upon the validity of an act of the legislature of the State of Louisiana imposing a tax on legacies given to aliens, it is said, in *Mager* v. *Grima et al.*, 8 How., 490, opinion, page 493:

"Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion, may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee. And may, if it think proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the

alien, subject to a deduction of ten per cent for the use of the state."

The decision in *Mager* v. *Grima*, in holding that the act of the legislature of Louisiana was nothing more than the exercise of the power which every state or sovereignty possesses in respect to real and personal property within its dominions, is approved in *Frederickson* v. *Louisiana*, 23 How., 445.

This authority of the State is also recognized in *Beard et al.* v. *Rowan*, 9 Pet., 301.

In that case, when holding, under the construction given to an act of the Legislature of the State of Kentucky, that one Campbell, an alien, became qualified to take title to the land in question and pass the same in the same manner as if he had been a citizen of the State, it is said, page 318 :

"No constitutional objection can be made to this act. It does not profess to naturalize aliens. It is not necessary that they should be made citizens in order to hold and pass real estate, and the condition upon which this may be done is a matter resting entirely with the State Legislature."

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a federal question was or is involved, and if this court on the record has jurisdiction, then it is respectfully submitted that under the decisions of this Honorable Court in *Micas* v. *Williams*, 104 U. S., 556 ; *Swope* v. *Leffingwell*, 105 U. S., 3 ; *The "S. C. Tryon,"* 105 U. S., 267 ; *The Alaska*, 130 U. S., 201, Opn. 208 ; *Chanute City* v. *Trader*, 132 U. S., 210, Opn. 213, 214, the judgment of the State court should be affirmed, because it is evident that the reasons assigned for the taking of the writ of error were and are frivolous, and that it was taken for delay only.

WILLIAM H. H. HART,

Attorney for Defendant in Error.

~~JOHN GARBER~~,
JOHN H. BOALT,
THOMAS B. BISHOP, AND
AYLETT R. COTTON,
Of counsel,

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FILED
MAY 10 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM 1896

HENRY T. BLYTHE ET AL.,

PLAINTIFFS IN ERROR,

AGAINST

FLORENCE BLYTHE HINCKLEY.

PROTEST

Of Plaintiffs in Error, against a Motion to Dismiss and Affirm being made in advance of the return day and before cause is docketed.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1896.

HENRY T. BLYTHE ET AL.,
Plaintiffs in Error,
Against
FLORENCE BLYTHE HINCKLEY.

Protest Against Motion to Dismiss Writ of Error, and Motion to Affirm.

Plaintiffs in error respectfully protest against the motion, and notice above described, which plaintiffs in error are informed will be attempted to be filed with the clerk of this court, on or before May 10th, 1897.

A writ of error to the Supreme Court of

California was sued out of this Court on the 24th of March, 1897, for a record from the Supreme Court of California. Under the rules of this Court (paragraph 4 of Rule 9), the time given to return the writ from California was sixty days. This rule fixes the time, which in the opinion of this Court is reasonable to return the writ. The parties applying for the writ are required to make assignments of error, which become a part of the record of the case. Plaintiff's attorneys say that they have not delayed in returning the transcript, but have expedited it as far as they can. Their clients do not live in San Francisco, but at a considerable distance therefrom, and they have to procure from them costs of obtaining the necessary record. The defendants in error suffer no hardship. They are in possession of the entire estate in controversy, and are enjoying the proceeds thereof to an amount, so plaintiff's attorneys are informed and believe, to exceed twelve thousand dollars per month. There is no special reason in this case why the practice of this Court should be departed from.

POINT 1.

Desiring to protect ourselves and clients, we submit objections to hearing the motion which we

are informed will be filed as above stated, and we appeal to the rules of this Court as our justification. Rule 9 declares that it shall be the duty of the plaintiff in error to docket the case, and file the record thereof with the clerk by or before the return day. By implication at least, this gives plaintiff until the return day to complete his record and assignments of error, and to procure the necessary costs thereof. The filing of the record by the appelee does not entitle him to have the case dismissed, if plaintiff in error also docket and file the record in proper time.

Hartshorn vs. Day, 18 Howard, p. 29.

The filing of the record by defendant in error, if within the time plaintiff returns the transcript, is premature.

POINT 2.

The motion which it is apprehended will be filed by defendant in error, on May 10th, does not identify the record which defendant in error expects to file as the record called for by writ of error. This must be the case, because it will not contain plaintiff's assignments of error. Rule 9 does not give defendant in error the right to file her motion in advance of the production of the record in this

Court by the plaintiffs in error, if in time, in response to the writ of error. Rule 9 says: "If the "plaintiff in error shall fail to comply with this "rule, the defendant in error may have the case "docketed and dismissed upon producing a certifi- "cate, whether in term time or vacation, from the "clerk of the Court wherein the judgment or de- "cree was rendered, stating the case and certify- "ing that such writ of error has been duly sued "out." The right of plaintiff in error to file the record, and have it docketed, is continuous up to the return day thereof; and the right of defendant in error to docket the case, is contingent upon plaintiff's failure so to do.

POINT 3.

The only motion that defendant in error can make on the failure of plaintiff to docket the case, is to docket and dismiss it. This present motion is a motion to dismiss the writ and affirm the judgment, and is not a motion to docket the case at all. Plaintiffs in error in this case, expect to file the record called for by the writ of error within the return day, and are using every reasonable effort so to do. If the said motion should be granted, plaintiffs in error would still have the right to file

the record within the return time and docket it, and have the case reinstated.

United States vs. Swan, 3 Peters, 68, where it is said:

"As the appellant whose appeal has been dis-
" missed for not filing a transcript of the record,
" has the whole term to file it, and move to rein-
" state the case, the clerk cannot give and certify
" a dismissal during the term."

POINT 4.

We object to the motion being considered by the Court, therefore, for the reasons above stated. It is not a motion to docket at all. The Court will not take up the case till it is docketed. A motion to dismiss cannot be made until the case is docketed, nor can a motion to affirm be entertained till then. Plaintiffs in error claim the right to have the case proceed regularly under the rules, and respectfully pray that the said motion be ignored.

POINT 5.

It is true that this Court has held in Clark vs. Hancock, 94 United States, p. 493, that where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dis-

miss the writ of error before the return day. This case was decided in 1876, under a rule giving much longer time for the return of the writ than the present Rule 9, which was adopted in 1891. In the case cited the Court say, "It is not "claimed by the plaintiff in error that there is any "Federal question disclosed by the record."

We respectfully submit that this matter was reduced to definite form by the rules of this Court, and set forth in the Appendix in 137 United States, p. 710. There it appears that Rule 9 was promulgated January 26, 1891.

The Court there made a brief time for the return of the writ, as was thought desirable, and by implication gave the full time of sixty days for cases coming from the Pacific Coast for the return of the writ.

The reason for the decision in 94 United States, is therefore removed by the present rule, by fixing a definite time therein for the return of the writ. There is no color of right in defendant in error to dismiss in this case, or justifying a motion to affirm. In no case that we can find, has a motion to affirm ever been made until the record has been returned in response to the writ of error. And in no case that we can find has the defendant in error been permitted to file what he calls the rec-

ord, with no writ of error attached thereto, and been allowed at the same time to dismiss the alleged record which he files. The record can only be authenticated by the writ of error. The Court will not hear oral evidence to show what the record is, or to identify it with a record called for by writ of error not present or returned, as a part of the record, with assignments of errors. Hence we claim that what the defendant in error has given notice that she will file on the 10th of May, is not the record of this case, and cannot be treated as such by this Court under its rules. We therefore again respectfully ask that the motion be disregarded. If, however, the Court entertains the motion at all, we ask reasonable time to file a brief against it.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
MAY 10 1897
JAMES H. McKENNEY
CLERK

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Supreme Court of the United States

OCTOBER TERM 1896

HENRY T. BLYTHE ET AL.,

PLAINTIFFS IN ERROR,

AGAINST

FLORENCE BLYTHE HINCKLEY.

Affidavit of Jefferson Chandler.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1896.

HENRY T. BLYTE ET AL.,
Plaintiff in Error,
vs.
FLORENCE BLYTHE HINCKLEY,
Defendant.

City and County of San Francisco, State of California—ss.

To the Honorable Chief Justice of the Supreme Court of the United States:

Jefferson Chandler, being duly sworn, on his oath, says that he applied as attorney for plaintiffs in error, for a writ of error in the above entitled case, which was granted on the 24th of March. That said application was made in the belief of affiant that it ought to be granted, and

that the record in the case justified it. He still so believes. Affiant says that he was presented with a copy of a motion to dismiss the writ of error, on or about April 9, 1897, returnable May 10th; believing that he was protected by the rules of Court that gave sixty days, as the writ on its face does, for the return of the writ, and fearing that it might be reported and returned to the Clerk of this Court, that he had accepted service for the 10th of May, he wrote to the Clerk of this Court that he had not agreed to submit the motion on the 10th. Affiant says that his clients are persons of limited means, and that he received notice on yesterday, April 30th, for the first time, that said clients had forwarded the necessary expenses of the transcript and docketing the case in this Court. Affiant says that he has diligently expedited the preparation of the case for hearing in this Court under the rules; that sixty days is a brief period for preparation and return thereof from this Coast. Affiant says that he sees from the public press herein enclosed, that he was charged in open Court with seeking delay, and with having procured the writ of error for delay. Affiant says that this charge, if made, is utterly without foundation in fact; that he has not had time to prepare a brief in answer to the motion to

dismiss, to be submitted on May 10th, such as he desires and could prepare if he were given the full time fixed by the rules, but, nevertheless, he forwards to-day to the Clerk of this Court a hastily prepared brief, to be submitted with the motion, if this Honorable Court on May 10th determine then and there to treat said motion as submitted.

Affiant most respectfully protests against an ex parte statement by an attorney, without notice to his adversary, imputing to him improper conduct and motives. The writ was regularly granted, and as affiant believes, ought to be sustained, and the judgment brought to this Court thereby considered.

JEFFERSON CHANDLER.

Office Supreme Court U. S.
FILED.
MAY 10 1897
JAMES H. McKENNEY,
CLERK.

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Supreme Court of the United States

OCTOBER TERM 1896

HENRY T. BLYTHE ET AL.,

PLAINTIFFS IN ERROR,

AGAINST

FLORENCE BLYTHE HINCKLEY.

Request for Oral Argument of the Merits on Motion to Dismiss.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1896.

HENRY T. BLYTHE ET AL.,
Plaintiffs in Error,
Against
FLORENCE BLYTHE HINCKLEY.

To the Honorable Chief Justice of the Supreme Court of the United States:

Your petitioners, Jefferson Chandler and E. Burke Holladay, respectfully show that they have been advised that it has been suggested to this Court that your petitioners seek delay in the hearing of this cause in this Court.

Respectfully protesting against such intimation, they earnestly ask that, inasmuch as they have conformed, as quickly as it was possible to do, with the suggestion of the Court that the motion

to dismiss might be submitted on May 10, 1897, by hastily preparing briefs in answer to said motion, and sending them with the record, on the first day of this month, to the Clerk of this Court, we respectfully request that the Court grant us one hour for oral argument on the motion to dismiss—the whole case being therein involved—we hereby agreeing that the whole case may be disposed of on its merits on the disposition of said motion, though the Court might otherwise overrule the motion.

The defendant in error being in possession of the property and its revenues, there is no inducement for delay on our part, and we only desire an adequate and speedy hearing of the propositions involved. If this Honorable Court should graciously grant this request, we would consent to the argument on any day after May 10th, giving time to reach Washington from San Francisco in the meantime. All of which is respectfully submitted.

Dated San Francisco, May 3, 1897.

L. D. McKISICK,
JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM 1896

HENRY T. BLYTHE ET AL.,

PLAINTIFFS IN ERROR.

AGAINST

FLORENCE BLYTHE HINCKLEY.

BRIEF AND ARGUMENT

Of Plaintiffs in Error, in Opposition to the Motion to Dismiss Writ and Affirm the Judgment, Filed by Wm. H. H. Hart, in the Above Entitled Cause.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1896.

HENRY T. BLYTE ET AL.,
Plaintiffs in Error,
Against
FLORENCE BLYTHE HINCKLEY.

Brief and Argument of Plaintiffs in Error, in Opposition to the Motion to Dismiss Writ and Affirm the Judgment, Filed by William H. H. Hart, in the Above Entitled Cause.

That the Court may see at a glance the contention here presented, we state that plaintiffs in error are citizens of the United States, and three of them are citizens of other States than California.

They claim to be heirs at law of Thomas H. Blythe, deceased, with the right to inherit his estate as such heirs under Section 1978 of the Revised Statutes of the United States.

Defendant in error claims to have been a non-resident alien, a subject of England, residing there at the time of descent cast, and to be the illegitimate child of Thomas H. Blythe. She admits this and sets it up on the face of the record and her motion.

She claims the right to take the estate of Thomas H. Blythe by descent under Sections 671-672, Statutes of California, which are set out in full in plaintiff's assignments of error and Sections 671 and 672 are set out in full in her counsel's argument in support of his motion, page 19.

We contend that the validity of said California Statutes and Section 1978 of the Revised Statutes of the United States is a drawn question in this suit, and each of said State Statutes is repugnant to the Constitution of the United States and the treaty authority of the United States, and to the jurisdiction of the United States over aliens, and especially to Section 10, Art. I, and the Fourteenth Amendment to the Constitution of the United States and the treaty power of the United States; and the decision of the State Court herein is in favor of the validity of such State Statutes, and against the validity of said Section 1978 of the Revised Statutes of the United States. This contention is one of law merely, and is the only question involved in this case.

This writ of error brings up before this Court only the distribution proceedings in the estate of Thomas H. Blythe, deceased.

Florence Blythe Hinckley filed her petition for distribution in the Superior Court of California; plaintiffs in error resisted the petition; a decree of distribution was made distributing to Florence all the real property of said estate; these plaintiffs in error appealed from said decree of distribution to the Supreme Court of California; that Court affirmed the decree of distribution, and plaintiffs sued out the present writ of error.

The federal question arises out of the fact that at the time of the death of Thomas H. Blythe and descent cast, said Florence was an alien, a subject of Queen Victoria.

Those facts were recited, as facts, by said Florence, in her petition for distribution herein.

By reason of the existence of those facts, the *very question* of her right or claim to have inherited land in the United States became a federal political question removed from the jurisdiction of State courts.

By reason of those facts the Courts of California had no jurisdiction to act upon her petition otherwise than to dismiss it.

In her said petition for distribution, said Florence claimed to be entitled to the real property

of this estate by inheritance only; she claimed adversely to these plaintiffs in error; and she alleged that at a time named, prior to the filing of her said petition, she had, as plaintiff, begun and prosecuted a certain legal proceeding in the Courts of California, entitled Blythe *vs.* Ayres, wherein and whereby she had litigated with these plaintiffs in error her right to the real property of this estate as heir at law and next of kin to Thomas H. Blythe, deceased.

And she alleged that she had recovered a judgment or decree therein against these plaintiffs in error, to the effect that she had inherited and had taken by inheritance all the real property of said Thomas H. Blythe, deceased.

She based her right to distribution upon the alleged judgment or decree, and she summoned these plaintiffs to come into Court and answer her petition.

These plaintiffs in error filed their answer to said Florence's petition, and they pleaded *nul tiel* record unto the judgment alleged to have been recovered against them.

The sole issue between said Florence and these petitioners upon said distribution proceedings was therefore one of law.

The history of this case shows that defendant in error began under the provisions of Section

1664 of the Statutes of California, set forth on pp. 6, 7 and 8 of defendant's motion, a preliminary proceeding to have herself declared the exclusive heir of Thomas H. Blythe, deceased. She was sole plaintiff in that case. The plaintiffs in error were made defendants therein and appeared in said proceeding in answer to her summons, and denied the right of defendant in error to the estate of Thomas H. Blythe. The lower Court found in said preliminary proceeding that defendant in error was the heir of Thomas H. Blythe, and entitled to the estate, because she was found to be an illegitimate alien child of said Blythe, though a subject of England; and that she had never been in this country until several weeks after the death of said Thomas H. Blythe, the time of descent cast. The present suit is founded on the result of the preliminary proceeding. In that proceeding only one fact could be inquired into. No judgment of distribution was possible.

The present suit is for distribution in which plaintiffs in error were made defendants, and compelled to answer. This suit must not be confounded with the preliminary proceeding. In the preliminary record it is admitted that defendant in error was an alien residing in and a subject of England when Thomas H. Blythe died. She now admits it.

On page 10 of her motion she says: "After a protracted trial (in the preliminary proceeding), "the Court decided in favor of Florence Blythe," (the defendant in error herein), "and the Court "made and signed findings." Pages 11 to 33, inclusive, State record, in which it was found that she was and is, the child of Thomas H. Blythe and Julia Perry; Finding 10, pages 20-21, and born in England, and remained there until after his death. Finding 1, page 12, the motion, as we interpret it, sets up this adjudication. Defendant in error now avows, as she formerly did, that she was an illegitimate child of Thomas H. Blythe, born in England, and resided there until after said Blythe's death, and consequently was a subject of England, who had never been in this country prior to said Blythe's death. She founds this suit on the judgment that she is an alien, page 15. The first question, therefore, is what is the legal effect of her plea of disability made in the motion itself. Defendant in error pleads her incapacity to make this motion and to inherit the real estate of Thomas H. Blythe in California. Plaintiffs in error claim that her eligibility to move this Court presents a federal question of the profoundest importance, and of the most distinct character. She states herself out of Court by admitting alienage. It seems to us that the presence of the federal

question in this record is admitted and set forth by the motion itself. She is estopped by it. Hermann on Estoppel, page 1426, Sec. 1276. It says, on page 15, as a part of the opinion of the Judge there given, that, "In the petition for distribution " (which in this case was presented by Florence Blythe, she averred as a foundation for her claim the judgment made in the (preliminary) matter of said estate, in the proceeding entitled, Florence Blythe *vs.* Abbie Ayres, et al., "These appellants," (plaintiffs in error) "joined issue with the petitioner, and pleaded *nul tiel* record." In the (preliminary) case of Florence Blythe *vs.* Abbie Ayres et al., in the Court's opinion mentioned the finding that she was an alien was had, spoken of in page 10 of the motion; it was there found that "she " was and is the illegitimate child of Thomas H. " Blythe and Julia Perry, born in England, and re- " mained there until after his death." So that the showing of defendant in error, in her motion to dismiss, is that she bases her right to make this motion and to the distribution of the real property of Thomas H. Blythe, on the distinct ground that she has been adjudged to be an illegitimate alien child; that she resided in England until Thomas H. Blythe died; was a subject of that country, and always had been and was residing

therein as such subject at the time of descent cast. That preliminary record was introduced in evidence in this case, over the objection of appellants (plaintiffs in error), who plead thereto *nul tiel* record, page 15. Plaintiffs in error objected to said judgment, in the preliminary proceeding because it was void, because the Court had no jurisdiction to render it.

It is a rule governing all judicial procedure that wherever a person under disability pleads that disability, and asks affimative relief, under such a plea or motion, the disability will neutralize the proceeding, and be sufficient ground for denying it.

A married woman, for instance, cannot make a motion in a case. 2 Daniel's Chancery, Vol. 2, p. 1596.

The defendant in error shows further, on page 20 of the motion to dismiss, that she claims the real estate involved, as an alien under a California Statute. We therefore respectfully call the Court's attention to the proposition, that where a party moves in a Court for affimative relief of any kind in that Court, and discloses in his motion asking the relief, disqualification to receive the relief, the case will be adjudged against the moving party. The motion is to affirm. The motion puts

in issue the whole structure and sufficiency of defendant's claim. The Court canont affirm without looking into defendant's status as an alien and without deciding that the Statutes of California operate abroad as a treaty. It being a motion for a decree it puts in issue the pleadings and the federal question on which the decree was rendered.

2 Daniel Chan., Sec. 827.

MOTION IS REPUGNANT.

Where a party discloses a federal question in this Court, in a motion to dismiss, for the alleged reason given in the motion that there is no federal question, the motion is repugnant, and the federal question as affirmed and presented by the motion itself will estop the moving party from denying the existence of the federal question. In this case, the defendant in error sets up that she is an alien, and on page 19 claims under a Statute of California, which she says gives non-resident aliens, such as she admits herself to be, the right to inherit land in California. If she has no right to take land in California by descent, she has no right to make this motion. Her remedy cannot be higher than her right. She is estopped from arguing against the legal effect of her admitted status as an alien.

When she pleads that she is a non-resident alien, and also that she is trying to take real property in California under a Statute of California, purporting to operate in England, she lays before the Court the source of her title. If California cannot enact such a Statute, the case must be decided against her on her motion. The Court will bear in mind that it is not averred or denied by plaintiffs in error that an alien in the country under federal comity may not sue for any injury done him, or for depriving him of any protection to which he is etntitled under international law. No such case is here presented. The contest here is not what an alien may do if here under the hospitality of the country, but is, can an alien take real property by descent in the absence of treaty, who is not here, or never has been, or does not contemplate coming here? There is no question of courtesy involved. The distinct question is, Can a State qualify a non-resident alien to inherit real property in this country, wihle residing in his own country, in the absence of a treaty between his country and this country, permitting him to do so? The defendant in error affirms that California can give the right to inherit, though its Statute is within the forbidden lines of the treaty power.

This is the sole issue presented by the pleadings in this case, page 15.

The defendant, having set up her disability in the motion to dismiss presents the legal effect of it, she having set up the facts out of which a federal question springs, is estopped from denying that there is a federal question presented to this Court. While, as is said in Story Equity Pleadings, paragraph 4, that an alien may sue under certain circumstances, "Still the subject " matter of the suit must be such as will entitle " him as an alien friend to maintain it. For if it " respects land, or any demand of a mixed nature, " partly real and partly personal, he may not be so " entitled."

It is a well settled doctrine of the common law, that an alien canont maintain a real or mixed action. The plea that the plaintiff is an alien interposed to a real action goes in general to defeat the right of action altogether, upon the ground of public policy, which denies the right of an alien to inherit or hold lands.

White *vs.* Sabriege, 23 Tex., p. 243.

An alien at common law cannot maintain ejectment.

Doe *vs.* Davis, 5 U. C. Q. B. (O. S.), 494.

Holliman *vs.* Peebles, 1 Tex., p. 673.
Harley *vs.* State, 40 Ala., p. 686.
Ritchie *vs.* Putnam, 13 Wend, p. 524.
5 Tex., 211.
31 Tex., 476.

A plea of alienage abates the action.

Sewall *vs.* Lee, 9 Mass., p. 363.
Martin *vs.* Ward, 9 Mass., 377; 9 Mass., p. 454.
Guyer *vs.* Smith, 22 Maryland, 239-247.

POINT 2.

THERE IS ONLY ONE ISSUE IN THIS CASE, AND THAT IS A FEDERAL ONE.

Defendant in error strives to make it appear that a State question is associated in this record with the federal one. This is erroneous. There was and is but one issue. It is found on page 15 of the motion. Defendant in error plead the alleged judgment in the preliminary proceeding as her whole case. She made plaintiffs in error defendants, and required them to answer, which they did. They plead *nul tiel* record. That the record was void because the Statute under which it was rendered, as construed, was void. A non-resident alien could not take under it. The

issue was one of law merely. That issue presented a federal question. It was the only question there. It is the only one here. The plaintiff in error was compelled to meet it there. They can raise it here.

Where a case is appealed from the trial Court to the Supreme Court of the State, the opinion of the Supreme Court must be consulted to show what was decided.

Griffin *vs.* Seymour, 83 Am. Dec., 398.

In the case at bar, the decision of the Supreme Court of California, appears on pages 15 and 16 of motion to dismiss, and does not contain any reference to the first alleged State question, stated by defendant in error, page 17 of her motion to dismiss.

The Court will observe also, that in every case cited by defendant in error to sustain the motion to dismiss because there was an alleged state question associated in the record with a Federal question, it was admitted that the Court from which the case was brought to this Court by writ of error, had jurisdiction under the laws of the State. In this case at bar, the jurisdiction of the State to grant real property to a non-resident alien was denied. The alleged jurisdiction of the lower

Court involves the power of the State to legislate upon the subject matter of a treaty. The plea of *nul tiel* record put in issue the jurisdiction of the State Court to award the real property to defendant in error.

Freeman on Judgments, 459, note (2).
Thompson *vs.* Emmert, 4 McLean, 125.
Bergen *vs.* Williams, 4 McLean, 125.
Hill *vs.* Mendenhall, 21 Wall., 455.

This is an issue of law, and the only one presented.

THE ONLY ISSUE IN THIS CASE WAS NUL TIEL RECORD. DEFENDANT CONSTANTLY CONFOUNDS THE LAST CASE WITH THE FIRST.

The Court will bear in mind that the title of the plaintiff's in error, in the preliminary proceeding, became imaterial, if the title of defendant in error was complete, and absorbed the whole estate. Hence, any finding of want of title in plaintiff in error would be outside of the issue even of that case.

Merrill *vs.* Chapman, 34 Cal., p. 251.
Smith *vs.* Westerfield, 88 Cal., 378-9.

"In ejectment, when title is found in one "party, the Court is not required to find the facts "constituting the other parties' claim of title."

The defendant in error claimed independently of and not against plaintiff in error. Defendant's claim was sustained.

Furthermore, if the plaintiff in error was practically non-suited in the preliminary case because of the finding in favor of defendant in error, such findings of fact do not bind the non-suited party; when he is driven out of the case, the findings of fact of those who remain against him cannot bind him. No relief was asked. There can be no estoppel on a finding not carried into a decree.

Gilson *vs.* Gilson, 47 Cal., 601.
Estate of Hobart, 57 Cal., 260.
2 Smith Leading Cases, 826.

When a claimant to property is omitted, and his claim denied, he is not precluded by what the Court does after his claim is denied. The doctrine that where there is a fund in Court to be distributed among different claimants, a decree of distribution will not preclude a claimant, not embraced in its provisions, having rights similar to those of other claimants who are thus embraced,

from asserting by bill or petition his right to share in the fund.

In the Matter of Howard, 9 Wallace, p. 184.

In this case, the defendant in error has in her motion thrust forward her unfounded title to the property. This Court say a party cannot by setting up an unfounded claim of title compel us, after deciding the claim against him, to take to ourselves a jurisdiction which, but for such claim, it could not have exercised.

Lanfear *vs.* Hunlay, 4 Wallace, p. 209.

The defendant in error, in her motion, sets up as the first question involved, in the very threshold of the case, an unfounded title in herself. She cannot ask the Court to turn aside from that unfounded claim to another, which, but for her claim, will take care of itself.. She cannot get affirmative relief in this Court, when she has presented her own title and claims under it, on the alleged weakness of some other title.

Furthermore, the Court will not fail to observe that the judgment brought here by writ of error found on pages 34-35, that the finding in favor of defendant in error is the only one that is carried into the decree, even in the preliminary decision. That decree says that none of the others are en-

titled to distribution, but does not say that they are not related to Thomas H. Blythe. The decree denies their ownership, but only on the assumption that defendant in error owns the property, notwithstanding the disability which she herself pleads in this motion. We submit, therefore, that it is a complete answer to this part of defendant's motion to say that under the laws and practice of California no finding in respect of plaintiffs' title—the Court having found the defendant was entitled to the property—was relevant, necessary, or of any legal consequence.

Furthermore, the petition for distribution filed in this case sets up, as heretofore stated, that plaintiffs in error were interested in the estate, and that they introduced evidence sustaining the allegations of their claim. The single hope of defendant in error in this case is to escape a decision of the Federal question here presented, whether California has jurisdiction by statute to confer upon defendant in error, a subject of England, residing there, real estate situate in California. That she claims through such a state of facts is affirmed by herself on page 10 of her own motion, and on subsequent pages.

Wherefore plaintiffs in error say that the motion of defendant in error herein ought to be denied,

and that it be adjudged by this Court that defendant in error, having moved this Court for affirmative relief, and having set up on the face of her motion conclusive reasons why she is not entitled to that relief, but is wholly ineligible to take the property sued for by her, said case ought to be adjudged to be without jurisdicti *ab initio*.

Where the Federal question disposes of the whole case, it must be heard. This Court must hear it, and may render final judgment here.

Murdock *vs.* City of Memphis, 20 Wall., 634.

Though two questions—State and Federal—be presented, this Court will not dismiss. Plaintiff in error is entitled to a hearing, to show that the Federal question is decisive of the whole case.

Railroad *vs.* Maryland, 20 Wall., 643.

POINT 3.

IS A STATE STATUTE THE EQUIVALENT OF A TREATY?

It appears on page 19 of defendant's brief, beginning with Point 2, that defendant in error affirms that her right to take the real property of Thomas H. Blythe, though admitting that she was a non-resident alien at the time of his death, is given to her by Sections 671 and 672 of the Civil

Code of California, which sections are set out on page 19 of said motion to dismiss. These sections, it is affirmed by defendant in error, have been held by the Supreme Court of California to operate as enabling Acts to her, and to be valid as such, and not in conflict with the Constitution of that State or the United States.

On page 20 of the motion it is declared that "There is no provision of the Constitution" (of California) "which prohibits the Legislature from "conferring rights upon those born in foreign "countries, who have never been residents of this "State." Section 671 is claimed by defendant as a link in her title to this property. And on said page 20 the issue is distinctly stated that Section 671 of the Code of California not only has an extra territorial effect, but that it projects its operation into England, and bestows an inheritable right on a subject of England there residing at the time to real property in California. It is stated on page 23 of the motion and argument that there is no doubt that if there were a treaty existing between the United States and a foreign country, providing that any citizen of the foreign country might take, in any of the United States, by succession, such provision in a treaty would have the effect to sus-

pend a State statute, or the rule of the common law, prohibiting such citizen of the foreign country from inheriting. In the absence of a treaty, defendant claims the State by legislation may occupy the ground of a treaty.

Plaintiffs in error claim that no section of California law relied upon by defendant in error operates for any purpose beyond the State of California, and cannot be made a rule of international intercourse, as a substitute for a treaty. It is claimed further by plaintiffs in error that the statute cannot give an alien resident of California any permanent right to stay in the State of California without the political consent of the United States, and cannot invest an alien with a fee simple title to land which carries with it the right of enjoyment forever, in the face of the undoubted and unquestioned authority of the United States to order said alien off the land, and to disappear from the country at any time it sees fit. That the State cannot say stay while the United States can say go. In short, that State jurisdiction, in its sum total, does not embrace authority over aliens at all. Defendant in error occupies from pages 19 to pages 28, inclusive, in discussing the alleged rights of aliens in a State, and the alleged rights of aliens residing in their own country, to property in a

State; and yet they say no such question is involved in this case. The legal difference between being and not being a citizen is a Federal question, though applied to a State matter.

Boyd *vs.* Nebraska, 12 Supreme Court Reporter, 390.

Missouri *vs.* Andriano, 138 U. S., 496.

POINT 4.

THE STATUTES OF CALIFORNIA DO NOT ON THEIR FACE OPERATE ABROAD, SO FAR AS THEY PURPORT TO OPERATE ON ALIENS THEY ARE VOID.

But defendant in error claims that she is a beneficiary under Section 671 of the California laws, set forth in full on page 19 of defendant's motion to dismiss. This section, it will be seen, does not apply to non-resident aliens in terms, but still defendant in error persists in her claim; says that the following language in Section 672, also found on page 19, "If a non-resident alien takes by suc- " cession, is carried by implication back into Sec- " tion 671, and enlarges it to non-resident aliens, " and that as so enlarged she may and does claim " under it." There is no warrant for holding that the language quoted from Section 672 enlarges the

meaning of Section 671. Section 672 is at most a statute of limitations against a right to inherit which may spring out of a treaty if made, and does not contribute anything to Section 671. It cannot so opoerate if intended.

9 Wheaton, *Supra*, 370.

——— ——— 7 Mass., appendix.

Crane *vs.* Reeder, 21 Mich.

In re Ross, 140 United States, 465.

If the two sections of the statutes of California mean what the Court below construed them to mean, in order to give jurisdiction to said Court in this cause, they cover, so far as they relate to non-resident aliens, the precise ground covered by treaties. This is admitted practically in the motion to dismiss, page 23, wherein it is said, "There is no doubt that if there were a treaty "existing between the United States and a for- "eign country, providing that any citizen of the "foreign country might take in any of the United "States by succession as heir, that such provision "in a treaty would have the effect to suspend a "State statute, or the rule of common law, pro- "hibiting such citizen of the foreign country from "inheriting." The claim of the defendant in error under this theory is reduced to the proposition that the State may act by statute upon the subject

of a treaty, if the Federal government does not act. This proposition is fallacious, and is discussed fully elsewhere. A State cannot exercise neglected Federal power; nor can it decide that the Federal government has neglected it, and that it is good policy to use it, when it is found not used by the Federal government. Especially is this so in respect of treaties, full power over which is granted to the Federal government, and denied in another section of the Constitution to the States. The contention of plaintiffs in error is that the Court below had no jurisdiction to administer a State statute which encroached upon Federal jurisdiction, whether the Federal government use its jurisdiction or not. Whether this contention be sound is a Federal question. This question is involved in the jurisdiction of the Court below, and was necessarily decided by the Court as a first question in the case. Defendant in error asks this Court to dismiss plaintiff's writ of error because she says that the Court below decided a State question adversely to plaintiffs. If the State Court below had no jurisdiction over the subject matter of the claim set up before it, its decision was and is void on all questions involved, and is as though never made.

When defendant in error appeals to this Court,

as she does in her motion to dismiss, to determine whether a State question decisive to plaintiffs' rights was decided in the State Court, she asks the Court to inquire into the jurisdiction of the Court so deciding said alleged State question. For if there was no jurisdiction to decide it, it is yet undecided. But in looking into the jurisdiction of the State Court, this Court is confronted with a federal question, rooted in the jurisdiction itself. This question must be first decided in favor of the jurisdiction, before the State question can be considered.

If the statutes which the State Court undertook to administer were void by reason of Federal limitations upon the power of the Legislature of California to enact them; if said statutes as construed covered the ground, and substance and objects of the treaty, then said statutes gave no jurisdiction to the State Court, and no State question is decided. The Federal question here presented lies at the base of the State Courts' jurisdiction. In the cases cited by defendant in error in the brief and argument, no question of jurisdiction was involved. In the case at bar this Court cannot get at the State question without first passing over the Federal question.

There is, however, no State question decided,

as a matter of fact, by the State Court below. That Court held that the defendant in error, then an avowed alien at the death of Blythe, was his heir under the operation of California laws, and that not only the adoption statutes of California operate in England, but the laws of inheritance of California also operate in England. This was all that was decided in the issues presented in the suit for distribution. Defendant in error set up a former judgment in her favor finding, as she claimed, this fact. Plaintiffs in error pleaded *nul tiel* record, and objected to the introduction of the record, because it was void for the reasons here stated. The only conclusion of law found, as will appear from the record, was that she was entitled to the estate. There was no conclusion of law that plaintiffs in error were not related to Blythe, nor was any such finding alluded to or mentioned in or carried forward to the decree. So that the alleged finding that is mentioned is no part of the conclusion of law found by the Court.

57 Cal., 260 *Supra.*

THE PROCEEDINGS UNDER SECTION 1664 WERE SPECIAL.

Special proceedings are proceedings of limited statutory jurisdiction.

> Bixler's Appeal, 59 Cal., on p. 555, and cases there cited.
>
> Smith *vs.* Westerfield, 88 Cal., on pp. 378 and 379.

The question is, what had the Court jurisdiction to determine under the preliminary proceedings? It is expressly defined in the Section 1664, as follows:

"And upon the trial of the issues arising upon "the pleadings in such proceeding, the Court shall "determine the heirship to said deceased, the own- "ership of his estate, and the interest of each re- "spective claimant thereto otherwise, and persons "entitled to distribution thereof, and the final "determination of the Court thereupon shall be "final and conclusive in the distribution of said "estate, and in regard to the title to all the prop- "erty of the estate of said deceased."

All that the Court had jurisdiction to determine was the heirship to the deceased. And when the Court determined that Florence was the sole heir

and sole owner of the estate, its jurisdiction was exhausted. All that follows in the section was simply the legal result of the determination. Having found, or decided, that Florence was sole heir and owner, the Court had no jurisdiction to find who were not heirs, nor owners, for when the Court decided that Florence was sole heir and sole owner, that was equivalent to finding that she alone was heir and owner to the exclusion of the whole human race.

Under the practice prevailing in the State of California, when this proceeding was tried in the Superior Court, the Court first announced its decision in favor of one or the other parties, and directed the attorney for the successful party to prepare findings, and it is a notorious fact that a vicious practice grew up of stuffing the findings with irrelevant, immaterial, and surplusage matter, which the Court allowed to pass without correction.

This case illustrates that vicious practice. Take for instance finding No. 13. (Here set out the finding which states that Hart offered to prove by secondary evidence the contents of a lost instrument). Clearly such a finding had no place in the decision. It was stuff. All the findings to the effect that none of the claimants other than Flor-

ence were heirs of the deceased, were mere surplusage, not necessary to the decision, and beyond the limits of the jurisdiction of the Court. See cases cited.

But the vicious practice above stated had become such a crying evil that the Legislature passed an Act at its last session to remedy the evil.

If we are right in contending that under its limited jurisdiction the Court had no power to determine anything but heirship, and ownership, then all acts of the Court in the preliminary proceeding beyond that were "nugatory and have no binding "effect, even upon those who have invoked its "authority or submitted to its decision."

88 Cal., 379.

And if the Court erred in deciding that Florence, an alien, was sole heir and owner, it acted without the limits of its jurisdiction, and its act in so doing has no binding effect upon the appellants.

POINT 6.

TREATY POWER.

By Section 10, Article 1 of the Federal Constitution a State is denied the power to make a

treaty. In the case of Geofroy *vs.* Riggs, 133 U. S., p. 258, it is held that:

"The treaty power of the United States extends "to the protection to be afforded to citizens of a "foreign country owning property in this country, "and to the manner in which that property may "be transferred, devised, or inherited." Court say on page 266, "That the treaty power of the "United States extends to all proper subjects of "negotiation between our government and the "government of other nations is clear. It is also "clear that the protection which should be affoded "to citizens of one country owning property in an- "other, and the manner in which that property "may be transferred, devised, or inherited, are "fitting subjects for such negotiation and of regu- "lations by mutual stipulations between the two "countries." * * * "The treaty power "as expressed in the Constitution is in terms un- "limited, except by those restraints which are "found in that instrument against the action of "the government or of its departments, and that "arising from the nature of the government itself, "and of that of the States."

See, also, Baker *vs* Portland, 25 Or., 556-572.

It is admitted in defendant's brief, page 23, that the power to regulate the descent of property in the State of California to non-resident aliens is within the treaty-making power; and it is also admitted that if there be a treaty on the subject in conflict with the laws of the State, that the treaty governs, and the laws of the State so in conflict will be held void.

Hauenstein *vs.* Lynham, 100 U. S., p. 483.

The claim of the defendant is, however, that there is no treaty between this country and England, of which defendant was, at the death of Thomas H. Blythe, a subject, and, therefore, in the absence of a treaty, the State of California was at liberty, by her legislation, to take up and legislate upon the descent of property to non-resident aliens, though the proper subject of a treaty between England and the Federal government. This proposition we deny on two grounds: First—California cannot occupy neglected Federal ground, and can, under no circumstances, carry a treaty benefit to anything in California, to a subject of England, living there; and, Second, because the benefit here considered is admitted to within the exterior lines of the treaty-making power, vested exclusively in the Federal govern-

ment, and by express terms denied to the State of California. There is no jurisdiction in the State over subjects delegated to the Federal government, resulting from the inaction of the Federal government, upon the subject delegated. It is said in Brown *vs.* State of Maryland, 12 Wheaton, p. 439, that:

"Questions of power do not depend on the de-
"gree to which it may be exercised. If it may be
"exercised at all, it must be exercised at the will
"of those in whose hands it is placed." Nor does the mode of handling the power give the State any advantage, it being inhibited from making a treaty; it was inhibited from legislating upon the subject of a treaty. Changing the form of action does not change the substance. It is said in the above entitled action, page 444: "It is treating
"a prohibition which is general, as if it were con-
"fined to a particular mode of doing the forbidden
"thing." A State cannot do by statute that which it is forbidden to do by treaty. It is the substance of the forbidden thing that it is forbidden to do, and the mode of doing it is a matter of indifference to the law. There is no jurisdiction in the State arising from the permission of the Federal government. Whatever jurisdiction the State has is original, and results from its inherent

power, its Constitution and the Constitution of the United States, and not from a temporary failure of the Federal government to exercise the jurisdiction that it has. When a power is granted the discretion to use it, when and under what circumstances it will be used, is a part of the grant itself. No discretion can exist in a State to use a power conferred in express terms upon the Federal government, and denied in equally express terms to the State.

The Suprmeme Court of the United States, in Henderson *vs.* the Mayor of New York, 92 U. S., p. 271, say: "Whatever may be the nature and "extent of that power where not otherwise re- "stricted, no definition of it, and no urgency of its "use, can authorize a State to exercise it in re- "gard to the subject matter which has been con- "fided exclusively to the discretion of Congress by "the Constitution." Nothing is gained in the argument the Court say by calling it police power. On page 272 the Court say: "But however diffi- "cult this may be, it is clear from the nature of "our complex form of government, that when- "ever the statute of a State invades the domain "to legislate which belongs exclusively to the "Congress of the United States, it is void, no mat- "ter under what class of powers it may fall, or

" how closely allied to powers conceded to belong " to the State." On the same page, the Court further say: " It is said, however, that under the " decisions of this Court there is a kind of neutral " ground, especialy in that covered by the regula- " tion of commerce, which may be occupied by the " State, and its legislation be valid, so long as it " interferes with no Act of Congress or treaty of " the United States." * * * " But this " doctrine has always been controverted in this " Court, and has seldom, if ever, been stated with- " out dissent."

In the case of Cooly *vs.* Board of Wardens, 12 Howard, p. 299, it is said: "Whatever subjects of " this power are in their nature national, or admit " only of one uniform system or plan of legisla- " tion, may justly be said to be of such a nature as "to require exclusive legislation by Congress." On page 273 of the case cited, in 92 U. S., *supra*, Court say: "It is apparent, therefore, that if there be a " class of laws which may be valid when passed " by the States, until the same ground is occupied " by a treaty or an act of Congress, this statute is " not of that class." And on page 268 the Court say: "In whatever language a statute may be " framed, its purpose must be determined by its

"natural and reasonable effect." The decision of 92 U. S. arose under that provision of the Constitution which forbids a State to levy imposts. The case at bar arises under that provision of the Constitution of the United States which forbids a State to enter into any treaty or alliance with a foreign government, and also under the Constitutional limitation upon its power, restricting its authority to citizens of the State residing therein. The legislation relied upon in this case to uphold defendant's claim is void, because of the inherent inability of the State to project the benefits of its legislation abroad, and because the defendant in error belonged to a class over which the jurisdiction of the State was denied in express terms. The denial by the Constitution of power in the State over treaties, withdraws from the Legislature of the State jurisdiction over the rights of aliens. The treaty-making power is exclusively adequate; and the State has no receptive power, because the Federal Government does not act upon or use its exclusive grant. If this be not so there may be as many foreign policies respecting aliens as there are States, and the States may decide that reasons adequate in the opinion of the Federal Government for withholding privileges from aliens of inheriting are adequate for the States to grant such privileges.

POINT 7.

THE BASIS OF PLAINTIFF'S CLAIM.

Section 1978 of the Revised Statutes of the United States, secures to complainant the Federal privilege and immunity to inherit real property in California if next of kin. This right, resting in Federal legislation, cannot be denied by that State. There is no dispute about the facts. Complainants rest their answer to defendant's contention on two grounds: First, the State of California has not provided for non-resident aliens; its laws, properly construed, do not purport to vest title to the real estate of said Blythe in one who was a non-resident alien when said Blythe died. Second, the construction of the Courts of California put upon said laws of California that they did so operate by their terms is unconstitutional, and said laws so construed are void. Section 17, Article I, of the Constitution of California, in force when defendant's contention arose, alleges: "For-
" eigners of the white race, or of African descent,
" eligible to become citizens of the United States
" under the naturalization laws thereof, while
" bona fide residents of this State, shall have the
" same right in respect to the acquisition, posses-
" sion, enjoyment, transmission and inheritance of

"property, as native born citizens." Previous to the adoption of this provision, California had declared by Section 671 of the Civil Code, as follows: "Any person, whether citizen or alien, may take, "hold, and dispose of property, real or personal, "within this State." Section 672 declared that, "If a non-resident alien takes by succession, he "must appear and claim the property within five "years from the time of succession, or be barred." These statutes properly construed do not purport to vest property in a non-resident alien. The rights of an alien under Section 671 are measured by the rights of the citizen. Under the Fourteenth Amendment of the Federal Constitution, no one is a citizen of the State who does not reside therein. The right of a citizen of another State to inherit in California is derived from Federal jurisdiction, and not from the State. An alien's rights by one State law are not good if at all in another State; hence the alien's rights as described in Section 671, spring out of the same conditions as the rights of the citizen of the State. This section, though otherwise construed by the Supreme Court of California, requires that an alien, to inherit, must be a *bona fide* resident of the State at the time the alleged right descends to him; and second, he must be eligible under the

naturalization laws of the United States to become a citizen thereof. This view is rendered absolutely conclusive under the operation of the principle that a State cannot legislate in behalf of anybody, whether citizen or alien, beyond the limits of its jurisdiction. This section construed under that principle, does not support defendant's contention that she inherited the property of Thomas H. Blythe; for it is admitted by the pleadings of this case, that at the death of Thomas H. Blythe, she was neither a *bona fide* resident of California, or any resident of that State, or the United States, nor was she eligible to become a citizen of the United States.

ELIGIBILITY.

Declaration of intention to become a citizen does not constitute citizenship.

Baird *vs.* Byre, 3 Wallace, Jr., 2 Federal Cases, p. 423.

A declaration of intention does not entitle a party to passport.

Same case.

The determination of the question of eligibility to become a citizen of the United States, is confided to a naturalization Court, wherein the applicant is inquired of under oath, whether he abjures

his allegiance to foreign countries; whether he is attached to the institutions of this country, and whether he will defend the institutions of this country. He must bring himself within the class that are not excluded by express Federal law in order to be eligible. When the Court adjudicates his eligibility, and issues to him his first papers, and not till then, is he eligible.

Section 672 of the Civil Code, speaking of non-resident aliens, does not purport to give such aliens any right to inherit, but says if a non-resident alien takes by succession (assuming that such right may be given by treaty, as is now the case in a modified sense with France and Switzerland and Russia), he must appear within five years. This Section is a Statute of Limitations merely, and has no other force or operation. State *vs.* Smith, 70 Cal., 153. The doubt expressed in the Statute in the words, "If a non-resident alien "takes," must be solved by some treaty permitting him to take. The State of California, realizing its impotency to confer an estate upon a non-resident alien, of whom neither the laws of the United States nor the State could reach, had in view the possible rights of such aliens under treaties, and undertook to fix the Statute of Limitations set up in contemplation of that possibility. It is

therefore confidently affirmed that the laws of California do not operate, and properly construed were not intended to operate to vest title to real estate in California, in the subject of a foreign government, residing in his own country. It is said that Section 17 of the Constitution limits the power of the State to take away the rights of a resident alien, who is eligible to become a citizen; and under that limitiation it still had power to declare that persons not residents, or not eligible to become citizens, might inherit. This interpretation of the Constitution is directly in conflict with the interpretation of a similar provision in the Constitution, Farrell *vs.* Enright, 12 Cal., 450, for it was held that an alien could not inherit at common law, and that the Constitution, permitting resident aliens to inherit, modified the common law to ident aliens to inherit, modified the common law to all aliens not coming within the relief granted in the Constitution. The whole action of the State on the subject is, however, an invasion of Federal power.

POINT 8.

THE TREATY POWER.

The power to make treaties with foreign countries is granted to the President and Senate. This

power simply authorizes the President and Senate to sign the name of this country to an agreement, the terms of which has been settled between the President and the Senate and some foreign country. The power covers all subjects of international intercourse. As has been shown, the Constitution and laws of the United States do not operate beyond the territorial boundaries of the United States. Such Constitution and laws may be made to apply to aliens who actually come into the country with the permission of the Federal government. They have no operation upon subjects of foreign countries, until they actually come within the boundaries of the United States. To what degree they may have protection while sojourning in this country, is a matter wholly Federal. They may be subjected to the executive department of the government merely. They have no rights to appeal to the Courts unless permitted so to do. See Chinese Seclusion Cases. The treaty power is special. A compact entered into between the United States and a foreign country operates by agreement of the parties thereto in their respective countries; hence a right may be conferred by treaty on a subject of a country in property in a country which he does not visit. Such right can be conferred in no other way. If,

therefore, a non-resident alien claims a right in this country without coming to the country, he must show a treaty between his country and this country, giving the right claimed; otherwise he has none. The legislative power of the Federal government is not adequate to project a privilege to a given citizen of a foreign country into his country and upon him. He can only be reached by and through the treaty-making power. While all the laws of the United States, Federal and State, and treaties as well, are local in their operation in every part of the United States to which they apply, treaties alone operate abroad. Section 672 of the Civil Code of California, therefore looked forward to the possible contingency of an alien's right to inherit land in California springing out of a treaty, and established a period of limitation for such cases.

It is not here admitted that California could establish lawfully a Statute of Limitation in such cases, but in the confused state of the law on this subject, many States have attempted so to do. A treaty operating on subjects of another country, and defining their rights in this country, are political measures purely. Within the lines of the treaty power all questions of Federal diplomacy and Federal political relations with other coun-

tries fall. The State being prohibited from considering the subjects involved within the treaty power, cannot substitute a statute for a treaty on treaty subjects. The fact that land is involved makes no difference. The Federal government operates on land. The Federal statute prohibits an owner of land from employing foreign pauper labor to work it. The power of the Federal government is no less over the subject because that power operates on the title to land or the use of land. It is a well settled principle under the common law, that if one sells, transfers, and conveys the issues and profits of land, that it is a conveyance of the land itself. Income tax cases uphold this doctrine. The Federal government may therefore prescribe the kind of foreign labor which one may employ in the use of land, and thereby affects the land itself.

The United States *vs.* Laws, 16 Supreme Court Reporter, p. 998.

POINT 9.

It is said, however, that the Federal government permits the State to provide for the descent of land of aliens, and therefore it may be done. The answer to this is that for a long time the government permitted State Courts to enforce mara-

time liens, and after forty or fifty years of indulgence, decreed that they had no jurisdiction so to do.

Belfast *vs.* Cooley, 7 Wallace, p. 637.

Judge Cooley remarks in his Principles on Constitutional Law, p. 80, "As the suffrage would "seem peculiarly to belong to citizens, and as the "voter for representatives in the State Legisla- "ture may vote for representatives in Congress "also, it would seem that there might be some "question whether a State could confer upon an "alien this high privilege. It is a question, how- "ever, which has never been made."

The failure to object does not legalize the act.

The right of an alien to inherit land in fee simple to the same extent as a citizen, implies the right to the same enjoyment of the land, when inherited, as a citizen. Yet notwithstanding such a claim of right, the alien may be banished any day by the Federal government from the land, without giving any reason therefor.

Tong Yuo Tine *vs.* United States, 149 Supreme Court Reports.

It is needless to say that the citizen cannot be so banished. The Statute, therefore, that measures the right of the alien by the right of the citizen, sets up a false measure.

POINT 10.

STATE POWER OVER ALIENS.

It is conceded that the treaty making power is supreme over the rights of aliens in this country, if that power be exercised. It is claimed, however, that if there be no treaty, then subjects of the treaty making power, to wit: the rights of aliens in a State, or while residing in their own country, may be taken up and acted upon by State Statutes; that is to say, the State gets jurisdiction over a subject within the control of Federal power, provided Federal agencies do not use the power which they possess. There is no principle of Constitutional law that sustains this theory. Constitutional power does not ebb and flow between the States and the federal government. Under such a theory the supreme power resides in the Federal govrnment to annul what the States may do during the interval of rest of Federal authorities. This theory shows that the power claimed for the State is not original, but that it is borrowed neglected Federal power. Congress cannot delegate or lend its power to a State, nor can the President and the Senate delegate any part of the treaty power to the State; for the State in terms is forbidden to exercise it. The power to

affect aliens while in their own country being exclusively a treaty power, the State under no circumstances can use it. Everything that relates to international concerns is taken away from the State by explicit inhibition.

EVEN FRIENDLY ALIENS MAY BE DEPORTED.

Fong Yue Ting *vs.* United States, 1020 Vol. 13, Supreme Court Reporter.

This is so clear that no further authorities need be cited. An alien has no capacity to sue because deported, or if any country failed to admit him, he has no right of action therefor.

Id.

An alien has no right to sue for land. Though admitted to the country under treaty, he is still an alien, and subject alone to the Federal government.

Id.

Henderson *vs.* New York, 92 United States, 273-274.

This power is vested in the political department of the national government.

Id. Page 1022. Their rights are not a subject of judicial inquiry. Same case, p. 1026-1029.

Paschel Annotated Constitution, p. 195.

Chae Chan Ping *vs.* United States, 130 United States, p. 581.

An alien cannot maintain ejectment.

Paschal Annotated Constitution, p. 204.

It is clear, says Judge Story, in Fairfax *vs.* Hunter, 7 Cranch, pp. 603-619, that at common law, an alien can take lands by purchase, though not by descent, or in other words, he cannot take by the act of law, but he may by the act of the party. Nor is there any distinction whether the purchase be by grant or devise. In either case, the estate vests in the alien.

Powell on Devises, 319 Attorney General *vs.* Duplessis.

Park 144.

Cokes Lit. 26.

Not for his own benefit, but for the benefit of the State, or in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. The question whether an alien holding lands by purchase can maintain an action for their recovery, is also considered in the case cited. On page 620 Judge Storys says: "It seems "intended to have been held that an alien cannot

"maintain a real action for the recovery of lands. "If an alien cannot maintain ejectment for lands "granted to him in express terms, because he "holds simply for the State and not for himself, "how much less can he recover lands by an affirm- "ative action of his own claim only by descent."

AN ALIEN CANNOT INHERIT.

Where an alien had land conferred upon him by an act of Congress, an unnaturalized child in England could not inherit.

Crane *vs.* Reeder, 21 Mich., 24.

The law of nations, and not the law of domicile, governs the status of aliens in the country.

Jones *vs.* Masters, 20 Howard, p. 20.

In the case of Crane *vs.* Reeder, 21 Mich., p. 59, Judge Campbell discusses the right of an alien child to inherit from a naturalized citizen (speaking, of course, of legitimate children). He says on page 61: "There is no serious question raised in "regard to the capacity of Harvey to transmit to "any lawful heirs, if he had any. His grant pro- "vided that he take an estate in fee simple." "It "was claimed," he says on page 64, "ordinance of "1787 did away in the rules of inheritance with all

"questions of alienage, and that the policy of the "government has always been to put aliens on as "good a footing as citizens, but," he says, "we "have not been able to trace any such intention "in the action of the United States. There has "always been a policy aimed at in inducing aliens "to become citizens, but none which would render "it indifferent to them whether they became citi- "zens or not. On the contrary, there are no Courts "in the country which have enforced the disabili- "ties of aliens, who do not secure citizenship, "more uniformly than the Courts of the United "States, and the laws and treaties speak the same "language. The only color for claiming such a "construction for the words of the ordinance is "because it does not say when decreeing the rules "of descent, that relatives must be American citi- "zens. And because it applies the same rules to "the estate of resident and non-resident pro- "prietors, but there are probably very few Stat- "utes which undertake to mention specifically the "citizenship of those who are to be affected by "them. It is implied in all Statutes that they "shall be read in accordance with the recognized "rules of interpretation, and applied to such per- "sons and things as fall naturally within their "scope. It is not customary in passing acts, to ex-

"press such disabilities as should be implied. "Alienage has been recognized in all common law, "and in most, if not all other countries as a dis- "qualification to hold land in fee. We have "treaties, some of which were with nations to "whom we desired to extend special favor, which "had provided for rights in real estate, on the "theory that aliens could not otherwise have the "rights of citizenship; and all our treaties require "the reciprocity of rights in the people of both "countries." Page 66. Page 68 he says: "The "disability of alienage had never any dependence "on feudal tenures, but always rested on the "broader principles that States are organized for "the benefits of their own people, and that those "who are not within the allegiance can have no "claim beyond what the law sees fit to give them." On page 69 he says: "If non-resident aliens came "within the Statute for any purpose so as to re- "ceive the benefits which enlarged a tenancy with- "out title into a freehold of inheritance, it was "chiefly for their benefit that the law was passed." If John Harvey was an alien, he could have no heirs; if he was a citizen, no alien could inherit his estate.

NON-RESIDENT FOREIGNERS.

The right to inherit depends upon the existing state of allegiance at the time of the descent cast, and the capacity of to take must then exist. Orser *vs.* Hoag, 3 Hill, p. 79: "Where a person dies leaving issue, some of whom are aliens, and others "citizens, the former are not deemed his heirs in "law, but the estate descends to the latter in the "same manner as if there were no other issue in "existence. The capacity to take by descent must "exist at the time the descent happens."

People *vs.* Conklin, 2 Hill, p. 67.

"The title to real property vests at once."

Levi *vs.* McCarty, 6 Peters, United States 102, 2 Kent 54.

Defendant in error claims that inasmuch as a writ of error was not taken from the decision of Blythe *vs.* Ayres, mentioned in the fourth clause of his motion to dismiss, this writ of error in the distribution proceedings will not lie.

The answer to that suggestion is two-fold. First, the distribution proceedings reached and disposed of the real property, and were original and independent of the preliminary inquiry under Sec. 1664 of the Code of Civil Procedure of California.

and reported in the case of Blythe *vs.* Ayres. Second, the decision in Blythe *vs.* Ayres is self-destructive. It was not concurred in by the requisite number of Judges to make it a binding authority for any purpose.

That decision is upon its face *felo de se*. It attempted to overrule the case of Pina *vs.* Peck, one of the cases which established the rule of property under which the complainants became vested with the title to the real estate of which Blythe died seized.

In attempting to change this rule of property and thereby divest complainants of their vested rights, Mr. Justice Garoutte said, 96 Cal., 590: "Pina *vs.* Peck is not authority in this case for two sufficient reasons: 1. But four justices participated in the decision (Justice Sanderson not taking part), and two of these justices concurred alone in the judgment. *This fact entirely destroys* "*the effect of the decision as an authority upon any* "*and all matters therein discussed.*" That being the rule applied to destroy the effect of the decision in Pina *vs.* Peck, the same precise rule destroys the effect of the decision in Blythe *vs.* Ayres as an authority upon any and all matters therein discussed for the reason that but two of the justices,

Paterson and Sharpstein, concurred with Mr. Justice Garoutte.

McFarland concurring specially said, p. 591: "But I dissent from the proposition that plaintiff " was adopted by deceased under section 230." On p. 504 he said: "Upon the second branch of the " case, I have come to the conclusion, *after a good* " *deal of doubt*, that the letters written by the de- " ceased," etc. "De Haven concurred in the fore- " going opinion of Mr. Justice McFarland. Chief " Justice Beatty and Justice Harrison being dis- " qualified, did not participate in the foregoing " decision." P. 595.

The decision in Blythe *vs.* Ayres upon which the defendant in error founds her claim to the property is a *tabula rasa*.

Plaintiff in error claims that no alien residing in his own country can be granted by the State a title to real property within the State by descent; that State laws purporting to do this, exceed the jurisdiction of the State, and encroach upon federal power.

Defendant in error claims that inasmuch as the land is within the State, that the State has exclusive power to regulate its descent, and may grant title to it, to non-resident aliens who have no purpose of becoming citizens. If plaintiffs in

error are right, the judgment of distribution is void, and all the findings leading up to it. If defendant in error is right, plaintiffs in error have no case.

The motion to dismiss involves the merits of the entire case. Attorneys for plaintiffs in error respectfully ask the Court to be permitted to make an oral argument on the motion, there being no question involved, except the one above stated.

Wherefore plaintiffs in error pray that the motion to dismiss and the motion to affirm be denied.

Respectfully,

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JEFFERSON CHANDLER,
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Attorneys for Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM 1896

HENRY T. BLYTHE et al.,

PLAINTIFFS IN ERROR

vs.

FLORENCE BLYTHE HINCKLEY.

ADDITIONAL BRIEF AND ARGUMENT

Of Plaintiffs in Error, in Opposition to the Motion to Dismiss Writ and Affirm the Judgment, Filed by Wm. H. H. Hart in the above entitled cause.

JEFFERSON CHANDLER,
E. BURKE HOLLADAY,
L. D. McKISICK,
Attorneys for Plaintiffs in Error.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET AL.,

Plaintiffs in Error,

AGAINST

FLORENCE BLYTHE HINCKLEY.

Point I.

I wish to cite the case of Savings & L. Soc. vs. Burnett, 106 Cal., pages 514 to 540. The contention between us can be stated in a word: Plaintiffs in Error claim that Defendant in Error could not inherit the real property, because she was an alien at the time of descent cast. The California Court found that she was the heir, though an admitted alien. They based that

finding, however, on the facts found that she was an illegitimate alien, residing in England at the time of descent cast and a subject of that country. On page 540 of the case above mentioned, 106 Cal., the Court hold, "That a general finding drawn as a conclusion from facts previously found, cannot stand if the specific facts do not support it." Our contention is that Defendant in Error sets up on the face of her motion the facts which neutralize and destroy the finding that she was *heir* of Thomas H. Blythe; that the finding that she was heir is overthrown in law by the finding of the facts which show that she could not be such heir. This is one proposition.

The Defendant in Error seeks to escape this, though the destructive facts are set up in her motion. First, she claims that the State of California had jurisdiction to make its laws active relating to inheritance and adoption of illegitimate aliens in England, and that they operated upon her in England, there residing at the time of descent cast. But they do not want this question decided, for they say that there is a finding in the case that Plaintiffs in Error were not related to Thomas H. Blythe.

Point 2.

The decision cited in 106 Cal., p. 539, in discussing the significance of findings, says: "Surely the main object of findings was not to afford a cover under which the prevailing party might successfully set a trap to hold an unjust judgment." The Plaintiffs in Error were sued and compelled to answer as Defendants in this action in the Court below. One party suing another admits that he has some interest in the controversy. On page 11, folio 28, Court declares in this very case: "A trial of said cause by jury was thereupon waived by oral consent of all of said parties, in open Court, and such waiver was duly entered, and thereupon the respective parties aforesaid, Plaintiffs in Error in said cause, adduced evidence in support of their respective allegations." The first finding, together with 10 and 11, show the full character of Defendant in Error and her claim. On this finding there is but one conclusion of law; finding number 22, page 33, folio 93, and on pages 34 and 35, folios 96, 97, 98, 99, in the decree, in which nothing is said about any other issue in the case than the heirship of Defendant in Error. There is no finding of law that Plaintiffs in Error were not related.

Estate of Hobart, 57 Cal., 260.

Nevertheless, Defendant's contention is that Plaintiffs in Error are cut out of any right to contest the questions presented in this Court because it is found (Finding 20, page 33, folio 92) that none of the Defendants herein, other than those named and enumerated in Finding number 18, nor is any of them, in any wise related to or in any manner akin to said Thomas H. Blythe, deceased. Upon this Finding, Defendant in Error hopes to escape any investigation of the title of Defendant in Error to real estate involved, though she pleads in her motion her inability to take title. This Finding is at most a part of a verdict, as the record shows the Court was sitting as a jury. This part of the verdict was not carried into the decree or into the conclusion of law which immediately followed (57 Cal., 260). Defendant in Error claims, however, that Plaintiffs in Error are bound by this irrelevant verdict, though no decree was rendered upon it, and that because of it the Court will not look into this case at all, though Defendant affirmatively asks relief in this Court, setting up her own disqualification. Our contention is that the Court had no jurisdiction of her claim, and that the judgment and Finding are void.

It is held in Herman on Estoppel, vol. 1, p. 69,

paragraph 68, that "If a Court has no jurisdiction, its decision is a nullity, and it matters not what facts it finds or what questions it decides. In fact, they are all nullities. If without jurisdiction it cannot adjudicate the real merits of the case, it cannot adjudicate any other question, whether it be introductory, incidental or collateral." Defendant in her motion shows no jurisdiction to make the Finding.

Point 3.

Our further contention is that the 20th Finding was not on any issue in the pleading in Blythe vs. Ayres, which presented the single claim that Defendant in Error was the heir, nothing more. She plead in this case a judgment, and not a verdict, to uphold the allegation in her Petition. Plaintiffs in Error denied the judgment. There was no other issue in said proceedings for distribution than the issue that she was heir. This is shown conclusively by the Petition itself and by conclusion of law 22, on page 33, folio 93, of the record. On the issue whether she was the heir of Blythe, that being the only issue, Finding 20 was irrelevant.

Point 4.

We contend further that at most Finding 20 in Blythe vs. Ayres was a part of a verdict, which was surplusage and of no legal vitality, and that a verdict does not estop a party. It is only the judgment rendered on the verdict that creates an estoppel; and no judgment was rendered on this part of that verdict. (See Finding 22.) The decree in the case brought here by writ of error, folio 225 to 231 inclusive rests on one issue—that defendant was heir. It appears in that decree that Plaintiffs were made Defendants and compelled to answer.

Point 5.

We contend further that, in the practice of California, attorneys for successful party draws the Findings, and that the decision of the Supreme Court of California in 106 Cal., 539, above cited, characterizes the consequence of such Findings that they cannot be so made that the prevailing party might successfully set a trap to hold an unjust judgment. Writs of error and appeals in all cases, if this were otherwise, might be cut out and prevented by an irrelevant Finding, drawn up by the adverse attorney, and put into the record with-

out contest, that his adversary had no interest in the matter, although he had been sued, brought into Court, and, notwithstanding the Finding, was outside of the issues in the case, and notwithstanding no judgment was ever rendered upon it. By an oral argument it could be shown conclusively that Finding 20 in the record is of no legal force in the case.

That we do not exaggerate the grounds of decision of the Supreme Court of California, we turn to the opinion of that Court in the case of Blythe vs. Ayres, 96 Cal., p. 563, on which Defendant relies, where it is said "that California laws are not confined in their operation within State lines. The Statute is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions. It is manna to the bastards of the world." Plaintiffs in Error deny that the Statute of California is manna to the bastards of the world. We submit that this is an overestimate of the strength of California laws. However willing California may be to distribute manna to the bastards of the world, she cannot tax the principles of international communion, nor use the treaty power to accomplish such distribution. There is no concealment in this case of the true character of De-

fendant in Error. It is all set out in the case she appeals to 96 Cal., 558-559, and is set up affirmatively in the motion and in all the papers of the case. It is not pretended that the law of domicile in California, or any rights of courtesy to an alien visiting there, is involved. The bald proposition is made that California laws in regard to the descent of property to aliens, and in regard to the adoption of illegitimate children living in England, there control, notwithstanding Finding 19, folio 90, which declares that the law of California is not, and never has been, the law in said United Kingdom of Great Britain and Ireland, nor has there ever been in said United Kingdom any law of adoption, or any law by which an illegitimate child could be acknowledged in writing, or otherwise be instituted heir or become the heir of a person, or any law by which an illegitimate child could be adopted as the child or heir of its putative father. It is in this case adjudicated that the social policy of England, and the status of a subject in England residing there, can be and was controlled by the laws of California; and that said laws could cover subjects within the treaty-making power. This claim of extra-territorial effect of California laws is the sole basis of Defendant's title.

Point 6.

Much reliance is placed by Defendant in Error on the decision in Blythe vs. Ayres, 96 Cal., p. 532. It will be seen that that case declares (pages 558–559) precisely what Plaintiffs in Error claim the facts to be in respect of the status of Defendant in Error. The decision is void on its face. That case swarms with international and federal questions, all decided wrong. Many authors on international law are quoted. The case itself discloses the reliance of the Supreme Court of California to maintain the title of Defendant in Error almost wholly upon international and treaty principles. Further, the Court was in doubt whether Florence was adopted under Sections 230 or 1387 of the Civil Code, both mentioned in Finding 19, three Judges taking one view, two the other, and the other two not sitting. And was in doubt whether said sections did not require that Florence should be received into the family of Thomas H. Blythe as a part of the process of adoption. If this were necessary, Florence should have been present to be received into the family. The Statutes operate only upon persons residing in California, and capable of being so received. In Finding 11, folios 58 and 59 of record, the diffi-

culties in the Court's mind in respect of the application of these two Statutes to persons living abroad will be seen.

Point 7.

GENERAL RULES OF INHERITANCE.

In Ross vs. Ross, 129 Mass., p. 226, it is said that the general rules of inheritance and the rules of status are two different subjects. It is said in Burton vs. Burton, 1st Keyes, New York, page 366, speaking of the right to dower: "The right to dower is not, however, given or withheld by Act of Congress, except so far as the right to it may be made by State laws to depend on the treaty or law-making power vested by the Constitution of the United States in the Federal Government. The Act of Congress does not of itself give to or withhold dower from alien widows, but as by the law of this State an alien widow cannot be endowered and a citizen widow can, the Act of Congress, by making her a citizen, gives her a status, in which the State law clothes her with the right, which without the Act of Congress she would not be entitled to enjoy."

The Defendant in Error appeals to every possible support of her claim on the assumption that there is some equitable right in her to this estate.

This Court, however, in Comegys vs. Vasse, 1 Peters, p. 221, say: "The heir, during the life-time of his ancestor, has no right, claim, title or interest in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor, and at all times, and in no just sense, a possibility of interest and right in the thing itself." It is therefore submitted that there is no eleemosynary ground for her claim. If she takes the estate at all, even though she were legitimate, which she admits that she is not and was not, it is cast as a benefaction upon her by the laws of California. She has no inchoate right in the estate. Her claim thus made assumes that California can naturalize her while living in England, without any action of the Federal Government, and can bestow upon her while abroad the right to inherit, though she never comes here. If she claim in five years, she may do so through an agent.

In Burton vs. Burton, 1st Keyes, p. 362, it is said: "It cannot require argument to show how vitally essential residence is to entitle a person to become a citizen of a country to which he does not owe a natural allegiance. The permanency and prosperity of the country depend in a great degree upon the attachment of its citizens. To

clothe aliens with a high prerogative of citizens, who have not resided in it, who know nothing of its institutions, who have never felt any of the responsibilities which a permanent resident of a country must feel, would be an act of madness or folly of which sane men could not be guilty. A law which would thus break down all the barriers which in all ages and in all countries, barbarous and civilized, have been thrown around the acquisition of the right of citizenship, would in a few years utterly destroy the government."

Defendant in Error could not be adopted under the laws of California unless she came to and was in California at the time of the alleged adoption.

Ross vs. Ross, 129 Mass., p. 267.

"But no State can declare that a person not its domiciled subject shall be the adopted child of another person Both the adoptor and the adopted must be personally subject to the laws of the State by whom the adoption is enacted."

Wharton's Conflict of Laws. Sec. 251.
In re Ross, 140 United States, p. 464.

Point 8.

IRRELEVANT FINDINGS.

Learned counsel prepared and submitted Finding 11 under the necessity felt by him that it must appear under Section 230 that Defendant in Error was recognized and received into Thomas H. Blythe's family. In said Finding it appears that one Alice Edith Blythe was from 1880 to the death of Blythe his mistress, and that she *consented* to the alleged relation of Defendant in Error to said Thomas H. Blythe. The strain on the case to show adoption was very great when it was determined that the consent of Alice, the mistress, was necessary. It is not perceived how such consent could be a substitute for family consent or operate between the two governments in lieu of a treaty.

Finding 13 also is wholly irrelevant, and relates to a ruling of the Court in excluding testimony offered by learned counsel for Defendant in Error. It bears on no issue in the case, but is in the nature of a Bill of Exceptions, filed by Defendant's counsel as a Finding. The narrowness of the issue is seen in the conclusion of law, Finding 22, consisting of two facts: First, Thomas H. Blythe adopted Defendant. That she is the lawful heir,

and the only person entitled to have and receive distribution. Second, she is entitled to her costs. Any Finding not contributing to this conclusion is irrelevant, under the issues of the case and under the terms of the decree of Blythe vs. Ayres, or the decree in this case, folio 225–231. Defendant in Error turns always to Blythe vs. Ayres for consolation, 96 Cal., 557. The Court say in that case that Plaintiff's (Defendant here) claim is based upon Sections 230 and 1387 respectively of the Civil Code of California. Said sections are there quoted. On p. 558 the issue is squarely stated by the Court that the Statutes operate in England. There is no dispute about her alienage and residence there at the time of Blythe's death. If the judgment of the Court gave to these Statutes the effect of a treaty, the judgment is void. That such effect was given to the Statutes is seen by consulting the case. The Court was divided, however, in determining whether Defendant in Error came under Section 230 or 1387, three Judges holding that she came under one, and two holding that she came under the other; two Judges failed to sit in the case.

The Supreme Court of California had previously held that such papers as were offered in evidence in this case to show adoption did not operate in

law as an adoption. (Pina vs. Peck, 31 Cal., p. 359.) That case, the Court say, however, is not binding in this case as a rule of property, because the requisite number of Judges did not concur in the result. If that be so, the decision of Blythe vs. Ayres falls under the same condemnation.

Defendant in Error is not content to allow this case to take the usual course under the practice, notwithstanding she is in possession of this vast property free from debt, as appears by the decree of distribution (folios 225 to 231 inclusive).

We respectfully claim the law to be that the party taking the first step in Court is bound by the recitals of fact in the moving papers presented. (2 Herman on Estoppel, Sec. 1276, page 1426.) When it appears on the face of such moving papers that the party moving is disqualified to receive the benefits claimed the Court will go no further in the case, but will then and there decide the judicial significance of the recitals made. The recitals in the motion to dismiss that Defendant was an illegitimate alien residing in England and a subject thereof at the time of descent cast disqualifies her to take the property involved and to make this motion, for reasons resting in Federal law; and therefore she presents a Federal question. The Court will bear in mind that this argu-

ment rests not only in the moving papers and petitions filed in the Courts of California, but applies to her motion filed in this Court.

If a Plaintiff demur to a Defendant's answer, such demurrer puts in issue the sufficiency of the first pleading, and brings to light the infirmities, if any, in that pleading.

In this case the motion to dismiss is the first paper filed in this Court. It asks for affirmative relief. It shows on its face a Federal question, and that the moving party is not entitled to the relief asked.

CONCLUSION.

This Court will see by consulting Blythe vs. Ayres, sole reliance of Defendant in Error, that the Federal question is the first and controlling question in the case (96 Cal., 558). The Court say: "The facts found by the Court, which face us while we are engaged in considering the first branch of this subject, may be succinctly stated as follows." Then the facts are given.

The first question there, and the one on which jurisdiction turned, was the eligibility of an illegitimate alien to take by descent. That is the first and only question here. In 96 Cal., 558, it is adjudged to be first question.

Defendant in Error relies upon that case and the facts stated on pages 558-559 as her foundation.

These facts present a jurisdictional Federal question.

This is a new question, never before presented in the sharp and distinct form in which this case presents it. And we respectfully but earnestly ask that the case be not decided adversely to us without an oral argument of one hour on the motion to dismiss, or on the merits.

All of which is respectfully submitted.

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E. BURKE HOLLADAY,
Attorneys for Plaintiffs in Error.

Alien can not bring ejectment
Siemsen v. Bofer, 6 Col. 250
Blight's Lessees v. Rochester, 7 Wheaton, 5

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MAY 20 1897
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 804

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

against

FLORENCE BLYTHE HINCKLEY.

SUPPLEMENTAL AND REPLY BRIEF ON MOTION TO DISMISS OR TO AFFIRM.

WILLIAM H. H. HART,
Attorney for Defendant in Error.

Filed May , 1897.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

HENRY T. BLYTHE ET AL., PLAINTIFFS IN ERROR,

vs.

FLORENCE BLYTHE HINCKLEY.

SUPPLEMENTAL AND REPLY BRIEF ON MOTION TO DISMISS OR TO AFFIRM.

The attorneys for the plaintiffs in error have deposited in this case with the clerk of this Court a protest against the hearing of the motion made by the defendant in error to dismiss or affirm, it being claimed that such a motion cannot be made in advance of the return day and before the cause is docketed.

This protest seems to be made upon the theory that the plaintiffs in error are entitled to the full sixty days within which to lodge the writ of error with the clerk of the supreme court of the State of California. On the other hand, it is contended on behalf of defendant in error that the return must be made and the record deposited in this Court within the sixty days, and if within sixty days, then why not at any time within that period? In view of the fact that the decision of the supreme court of the State of Cali-

fornia, to which the writ of error issued herein, was rendered on November 30, 1895, and the writ herein not applied for or granted until the 24th of March, 1897, certainly the defendant in error was entitled to know the contents of the writ of error and to receive a copy thereof, the same having become a judicial record upon the issuance of said writ on March 24, 1897; and the fact that she made a demand that a copy of said writ be lodged with the clerk of the supreme court of the State of California, and that she be furnished or allowed to take a copy thereof, as will fully appear from the notice given by her attorney and the affidavit of Aylett R. Cotton, Jr., filed herein, and the fact of the refusal of the attorneys for the plaintiffs in error to lodge said writ with the clerk of the supreme court of the State of California, or to furnish or to permit a copy to be taken of said writ, warrants the defendant in error in saying "that it is manifest from the record herein that the reasons assigned for the taking of the writ of error were and are frivolous, and that it was taken for delay only," and especially in view of the facts and law as set forth in the motion to dismiss or affirm and the argument in support thereof.

To enable this honorable Court, when considering the motion of the defendant in error to dismiss the writ of error brought in this case, to understand the facts in this case and what was determined in the State court, the defendant in error has caused the record in the supreme court of the State of California, to which court said writ was directed, to be certified by the clerk of that court and to be printed and filed with the clerk of this Court.

On April 30, 1897, the plaintiffs in error lodged the writ of error issued herein with the clerk of the supreme court of the State of California, and on May 1, 1897, the defendant in error obtained from the said clerk of the said State supreme court a further certificate, showing the contents and service of said writ of error, and that the record

certified to by him as such clerk on April 24, 1897 (being the one lodged by defendant in error with the clerk of this Court), was and is a full, true, and correct transcript of the record and of all proceedings and of the judgment and opinion of said court in said cause, S. F., 98, and said last certificate is also filed and printed as a part of the record in this cause; that thereafter, on May 7, 1897, the plaintiffs in error lodged with the clerk of this Court a copy of the writ and the record, which is the same as the record filed herein by the defendant in error (excepting, however, the dates of the certificate), and that the record as printed by the defendant in error is a correct copy thereof, and is printed for the purposes of her motion to dismiss or affirm; and, notwithstanding the record is now on file in this Court, the attorneys for the plaintiffs in error claim that the motion of the defendant in error to dismiss or affirm is premature. I think not.

The defendant in error has adopted the practice approved by this Court in *Clark vs. Hancock*, 94 U. S., 493; in *Ex parte Russell*, 13 Wall., 671, and in *Thomas vs. Wooldridge*, 23 *id.*, 283, op. 288, in which cases it was held permissible for a defendant in error or an appellee, in advance of the return day of the writ or of the time for filing a transcript on appeal, to move to dismiss when the record discloses that there is no Federal question involved, and that the appellee or the defendant in error could procure and present the record and have it printed, to be used upon the hearing of the motion.

In *Clark vs. Hancock* the motion was to dismiss the writ of error before the return day of the writ for want of jurisdiction. In the opinion in that case is the following:

"It is not claimed by the plaintiff in error that there is any Federal question disclosed by the record, but it is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice; but in *Ex parte Russell*, 13 Wall., 671, and *Thomas vs. Wooldridge*,

23 *id.*, 288, the rule was changed. It seemed to us then that such a change would 'be likely to prevent great delays and expense, and further the ends of justice.' Subsequent experience confirms that opinion. In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely, and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind. In the present case we have a printed record, and it is evident we have no jurisdiction."

The attorneys for the plaintiffs in error have also lodged with the clerk of this Court their brief and argument in opposition to the motion to dismiss the writ of error or affirm the judgment. An examination of this brief will show that there is no answer made to the motion to dismiss in any particular, and an examination of the cases cited in support of their position will be found either to sustain the position of the defendant in error, or that the decisions were based upon the common-law rule in force in those States in which the lands in dispute were located, and such law has not been in force in California since the 19th day of April, 1856, as will fully appear from the authorities cited in the argument in support of the motion to dismiss, at pages 19–22.

The plaintiffs in error have failed to cite one authority in opposition to, nor do they controvert, the decisions of this Court referred to in the argument in support of the motion to dismiss under subdivision VIII, pp. 26–28.

Since the writing and serving, on April 9, 1897, of the motion to dismiss or to affirm and the argument in support thereof my attention has been called to the case of Hanrick *vs.* Patrick, 119 U. S., 156 (Opinion, 167–170), which fully sustains the position assumed by the defendant in error, that her right to inherit property in California is governed entirely by the laws of the State of California, it being held in the case of Hanrick *vs.* Patrick that the laws

of Texas govern the right of inheritance of property in said State.

It was stated in the opinion of this Court in the case of Gormley *vs.* Clark, 134 U. S., 338, as follows:

"Upon the construction of the constitution and laws of a State this Court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution or of a Federal statute or a rule of general commercial law (Norton *vs.* Shelby County, 118 U. S., 425, 439), and this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law, and also in reference to the common law of the State and its laws and customs of a local character when established by repeated decisions (Burgess *vs.* Seligman, 107 U. S., 20; Bucher *vs.* Cheshire R. Co., 125 U. S., 555). Substantially conclusive effect is given to such decisions upon the construction of State statutes as affecting title to real estate within the State. (Ridings *vs.* Johnson, 128 U. S., 212; Bacon *vs.* Northwestern M. L. Ins. Co., 131 U. S., 258; Hanrick *vs.* Patrick, 119 U. S., 156, 169.)"

See also Giozza *vs.* Tiernan, 148 U. S., 657.

It is contended by the plaintiffs in error, page 4 of their brief, that the issue in this case before the supreme court of the State of California was one of law, they having filed their answer to Florence's petition for distribution and pleaded *nul tiel record.*

I respectfully submit that the issue as to *whether there was a record or not*, or as to *whether it had been properly entered or not*, was one of fact and not of law, and that such fact was found by the trial court and by the supreme court of the State of California against the plaintiffs in error; and, being a question of fact, the decision of that court upon that subject was final and conclusive and not subject to review in this Court.

It is contended by the plaintiffs in error that the defendant in error by her motion admits that she was an alien at

the time of descent cast, and therefore she is not entitled to make the motion or to be heard in reference to the matter. The difficulty with the plaintiffs in error is that their contention is unfounded, both as to fact and law—that is, they start out by presuming that because she was an alien she was not entitled to inherit or to be heard in the State court or here, and, assuming that to be the law and fact, they proceed to argue that she is not entitled to be heard and not entitled to inherit. The fallacy of their proposition is that they are wrong in the premises; that the authorities cited in the argument in support of the motion to dismiss show that in the State of California the defendant in error was entitled to inherit property within that State, according to the laws of that State, and that is the end of the controversy; they also contend that the alienage of the defendant prevented the State courts from having jurisdiction—that is, had jurisdiction to decide against her, but not jurisdiction to decide in her favor. I do not understand such a theory; I suppose that, the State court having jurisdiction of the subject-matter—the estate of Blythe and all parties coming before the court to determine who was entitled to it—the State court had jurisdiction irrespective of citizenship.

At page 26 of the brief filed by the plaintiffs in error it is claimed that the proceedings under section 1664, Code of Civil Procedure, were special, and they there contend that upon the trial of the issues arising upon the pleadings in such proceeding the court shall determine the heirship to said deceased, the ownership of his estate and the interest of each respective claimant thereto and persons entitled to distribution thereof; a final determination of the court thereupon shall be final and conclusive in the distribution of said estate and in regard to the title to all the property of said deceased; and it is contended by them that the court had jurisdiction to determine the heirship to said deceased. Even under that view of the case the court, in de-

termining the heirship to the deceased, was also required to ascertain who were related to him and what relationship they bore, and the court in said proceeding having found that the plaintiffs in error were not at all related to Thomas H. Blythe, deceased, that that was a final determination as against them, and was conclusive as to their right to any part or portion of the estate. Not being related to Blythe, they were not entitled to any of his property, whatever might be the rights of others.

I respectfully submit that the proceeding under section 1664, Code of Civil Procedure of the State of California, was conclusive and final as against the plaintiffs in error and all parties concerned. That section is quoted in full, commencing at page 6 of the motion to dismiss and argument in support thereof, and in addition to that I submit that the question in this case has been fully settled by the supreme court of the State of California, as will fully appear from the following cases:

Blythe *vs.* Ayres, 96 Cala., 532–595.

Also The Blythe Estate, Blythe *vs.* Ayres, 102 Cala., 254, 264.

Also The Estate of Blythe; Henry T. Blythe *et al.*, appellants, 110 Cala., 229–231; and other cases there cited.

I respectfully submit that under those cases the question as to whether the defendant in error was entitled to inherit the property of Thomas H. Blythe, deceased, was a question involving real property within the State of California, to be governed entirely by California laws as construed by California courts, and affecting the property within the State of California, without reference to the residence of either or any of the claimants, and under the laws of California, without regard to their alienage or citizenship. The right of an alien to inherit in California is a question for the

sovereign power of California to determine, which has been fully provided for by the acts of its legislature, and its highest court has determined that issue in favor of the defendant in error, and that judgment should stand.

There is no question or claim of a treaty between California and Great Britain. Such a controversy is not involved in this case, and the authorities cited by counsel against the right of aliens to inherit are those where the common law is in force and not as it is in the State of California, where such law as to inheritance is not in force.

I consider that all other points made by the brief and argument of the plaintiffs in error in opposition to the motion are fully answered by the argument in favor of the motion to dismiss the writ of error.

The assignments of error raise no Federal question.

I respectfully submit that the writ of error should be dismissed for the reasons assigned, and, if not, then that the motion to affirm should be granted.

WILLIAM H. H. HART,
Attorney for the Defendant in Error.

Townships 7 & 8 North of Range 63 West of the 6th P.M.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13

Range 64 West.

Range 62 West.

Township 8 North Range 63 West of the 6th P.M.

19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Fence encloses Sections 5 8 & 17 some of the fractions of Secs in Range 62 all of which are deeded or leased lands.

Range Line

All odd numbered sections belong to either Drury or Camfield.

Township Line.

Range Line

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13

Range 64 West.

Township 7 North Range 63 West of the 6th P.M.

Range 62 West

19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	School 36

Black lines are Section lines — Red line is line of fence, unless at points where Camfield owns the even Sections or has school land leased in which case fence is on Section lines.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28.	27	26	25
31	32	33	34	35	36
		Township Line.			
6	5	4.	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	School. 36

Range Line

All odd numbered sections belong to either Drury or Camfield.

Range Line.

Black lines are Section Lines – Red line is line of fence.

Plaintiff's Exhibit 7.

MAP OF THE CAÑADA DE COCHITI

Bernalillo Co New Mexico Sep 15 1884

Scale 6 000 ft to 1 inch

Surveyed and Drawn by William Harris M.S.

N

Rio Tijeras

Rio Grande

Cañon del Oso

Cochiti

Pueblo Santa Fe

Pueblo Santa Bianca

Pueblo Cochiti

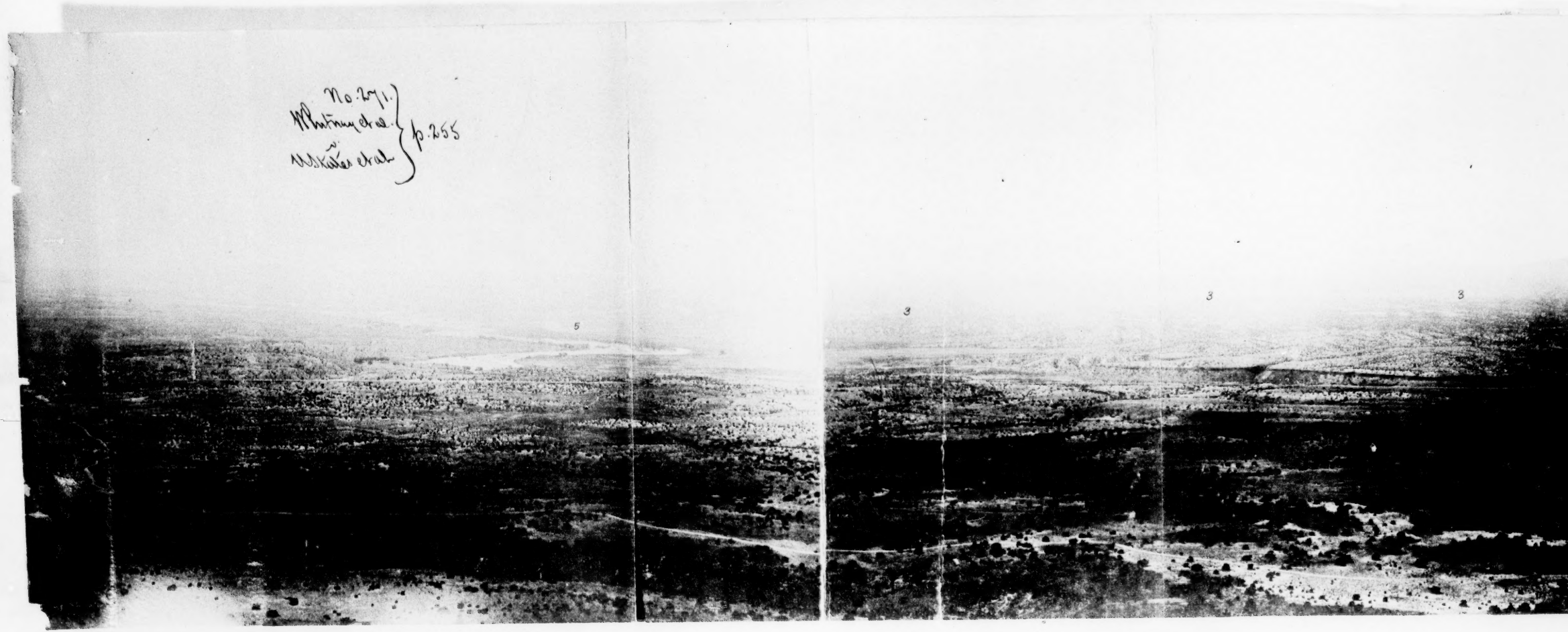
Grazing

Farm Land

Arid Land

Sand Hills

no. 271.
Whetstone et al } p. 259
v.
U.S. States et al


No. 241.
Přístavní ulice
k p. 255

Lemhi Pass
Mc

INGLESIDE

RECORDED, SURVEYORS OFFICE
BOOK 8 PAGE 37

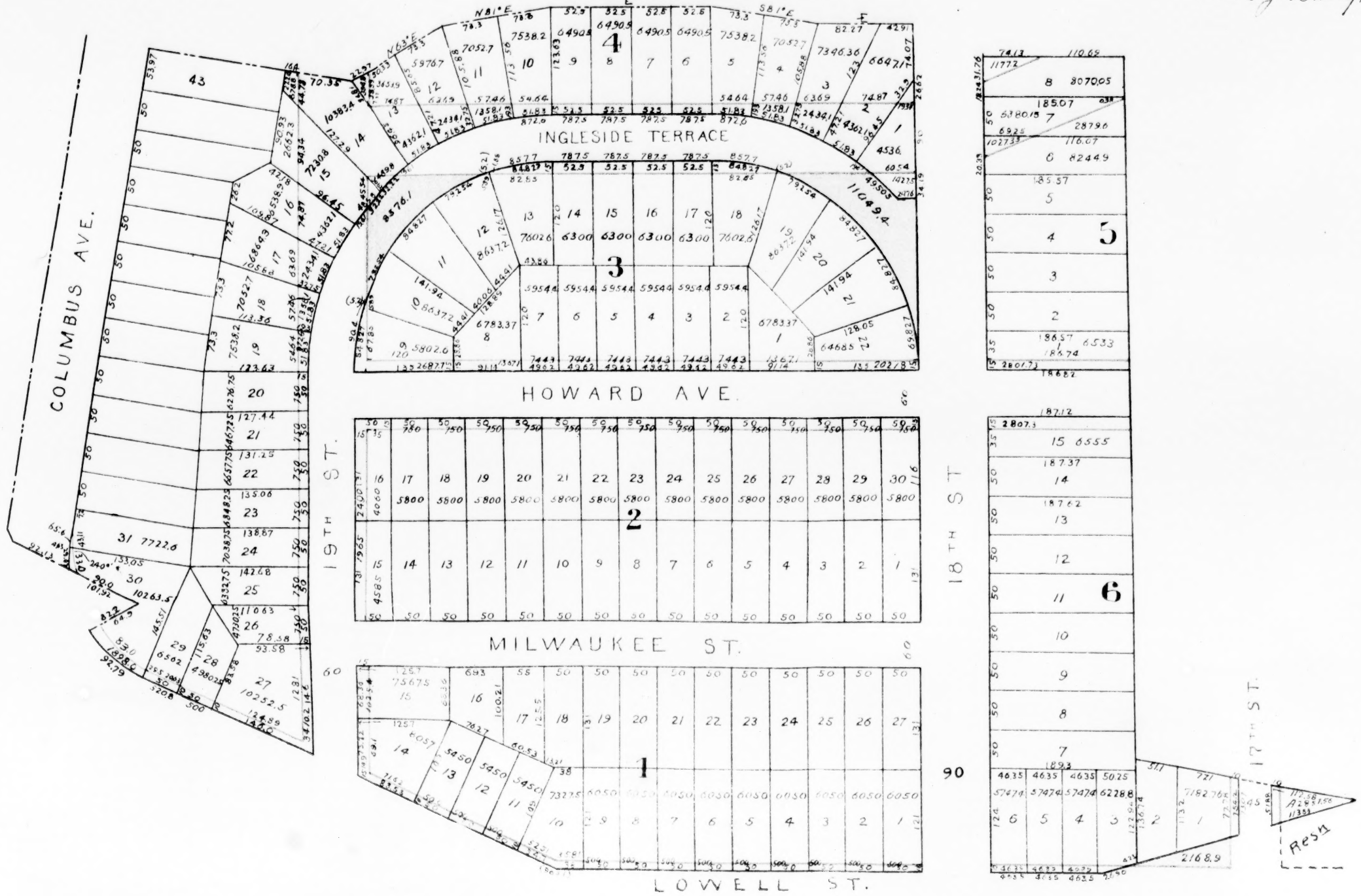
Nos. 626 & 627
Bauman et al
Ross et al, Commrs.
Ross et al, Commrs
v.
Bauman et al.

Page 5.

Commissioners' Ex. No. 1.
Filed September 27th 1895

Verified from the map of Highway Extension Plans, made under the Act of March 2 1893 and recorded in the Office of the Surveyor, D. of C.

M. C. Hazen
Thos. C. J. Bailey, Jr.



Block No	Lot No	Area Taken Sq Ft.	Remarks	Block No	Lot No	Area Taken Sq Ft.	Remarks
1	1	500		3	22	2021.8	
	2	500					
	3	500		4	1	4536	
	4	500			2	4362.1	
	5	500			3	2434.1	
	6	500			4	1358.1	
	7	500			5	872.6	
	8	500			6	787.5	
	9	500			7	787.5	
	10	905.1			8	787.5	
	11	500			9	787.5	
	12	500			10	872.6	
	13	500			11	1358.1	
	14	1514.9			12	2434.1	
	15	1025.4			13	4756.9	
					14	10383.4	
2	15	1965			15	7230.8	
	16	2490			16	4362.1	
	17	750			17	2434.1	
	18	750			18	1358.1	
	19	750			19	872.6	
	20	750			20	750	
	21	750			21	750	
	22	750			22	150	
	23	750			23	75.0	
	24	750			24	750	
	25	750			25	750	
	26	750			26	750	
	27	750			27	3410.2	
	28	750			28	500	
	29	750			29	5208	
	30	750			30	2138.0	
					31	65.6	
3	1	1367.1					
	2	744.3		5	1	2801.7	
	3	744.3			6	1077.3.5	
	4	744.3			7	6380.15	
	5	744.3			8	8070.05	
	6	744.3					
	7	744.3		6	1	7542	
	8	1367.1			3	269.6	
	9	2687.7			4	463.5	
	10	5.2			5	463.5	
	12	5.2			6	463.5	
	13	857.7			15	2807.3	
	14	787.5					
	15	787.5			A	2857.56	
	16	787.5					
	17	787.5					
	18	857.7					
	19	5.2					

WILMINGTON HARBOR
MORMON I.
LAZY
N

No. 175
Gayetera } p. 73
v.
Banning

RANCHO SAN ANTONIO.

RANCHO TAUJITA
(OR LOS CUERVOS)

RANCHO SOUSAL REDONDO.

LOT No 37

T. 3 S. R 13 W.

LOT 37

LOT 38

LOT 39

T 3, R. 12 W.

N. DOMINGUEZ

MANUEL DOMINGUEZ.

ALEXANDER BANNING
HALF WAY HOUSE

ROAD FROM SAN PEDRO TO LOS ANGELES

POINT OF WATER

TOMB OF WATER

LOT No 37

T. 3 S. R. 14 W

LOT No 37

T. 4 S. R 14 W

T. 4 S. R 13 W.

LOT No 37.

RANCHO PALOS VERDES.

ROLLING PLAIN.

PACIFIC OCEAN.

RANCHO LOS CERRITOS.

SAN GABRIEL RIVER.

LAGOON

CASERIA

INDIAN HUTS

DON JUAN TEMPLE.

LOT No 37

T. 5 S. R 13 W.

INNER BAY OF SAN PEDRO.
(EXCEPTION)

PACIFIC OCEAN.

MAP
OF THE
RANCHO SAN PEDRO.

FINNALLY CONFIRMED TO

MANUEL DOMINGUEZ ET. AL.

SURVEYED UNDER THE DIRECTIONS OF THE
U.S. SURVEYOR GENERAL.

BY

HENRY HANCOCK.
DEPUTY SURVEYOR.
DECEMBER 1857.

SCALE OF 60 CHAINS TO ONE INCH.

L. S.

THE FIELD NOTES OF THE "RANCHO SAN PEDRO" AND FROM WHICH THIS MAP HAS BEEN MADE OUT, - HAVE BEEN EXAMINED AND ARE ON FILE IN THIS OFFICE - U.S. SURVEYOR GENERAL OFFICE.

SAN FRANCISCO CALIFORNIA FEB 14 1858.

J. W. MANDERVILLE.
U.S. SURVEYOR GENERAL.
CALIFORNIA.

BOUNDARY LINES.

	Chs	Lks		Chs	Lks		Chs	Lks		Chs	Lks
N 53½ W	62	03	N 49° W	10	01	N. 30¼ E	11	50	N. 30° E	19	63
S 78° "	105	60	" 18¾ E	7	00	" 44¾ "	9	00	" 43¾ "	18	50
" 87 "	51	10	" 78¼ "	10	00	" 45¾ "	11	00	" 26¾ "	7	30
" 71¼ "	88	83	" 14¾ "	11	50	" 63¼ "	6	20	" 18¾ "	14	40
" 67¾ "	84	05	" 16¼ W.	4	50	" 47¾ "	7	00	" 26¾ W.	3	50
" 46° "	361	02	S 65° "	2	30	" 61¾ "	10	00	" 20° E	5	00
" 52¼ "	56	50	N. 15¾ "	18	00	" 47¼ "	7	00	S. 89 "	6	40
" 53¾ "	42	00	" 24¾ E	33	50	" 63¾ "	4	50	N. 16¾ "	7	40
" 58¼ "	64	00	" 44 W	3	50	" 40¾ "	6	00	" 57¼ W.	10	81
" 63¾ "	91	00	" 24¾ "	12	00	" 24¾ "	10	00	" 24¾ "	4	50
" 23¼ E	22	26	" 10° E	4	22	" 143¾ "	10	50	" 9¾ "	2	44
" 26¼ "	8	50	" 43¾ W	13	00	" 23¾ "	16	00	" 51¾ "	1	70
" 33° "	24	00	" 33¼ E	18	50	" 35¾ "	6	00	" 15¾ "	11	00
" 24° "	36	00	" 27¼ W	18	70	" 60° "	5	00	" 5° "	13	50
" 74¼ "	13	92	" 6° E	26	50	" 15¾ "	10	00	" 73¾ E	7	00
" 23¾ W	25	00	" 36¾ "	13	60	" 24 W.	8	50	" 26 "	11	84
" 84¾ W	26	92	" 17¼ W	12	00	" 65¼ "	10	00	" 26¾ W.	5	78
" 88° E	32	10	" 7° E	8	00	" 28° "	7	62	" 60° "	5	00
" 84¾ "	185	67	" 30¾ "	10	00	" 17 "	10	00	" 74¾ "	7	53
" 77¼ "	138	50	" 5° "	5	11	" 8¼ "	6	00	" 36¾ "	11	33
" 66¼ "	164	61	" 34½ W	7	50	" 25¾ E	2	20	" 21¾ "	6	00
" 64¾ "	46	32	" 1° E	4	00	" 78° W.	6	50	" 39¼ E	9	43
" 7° 03' "	337	20	" 23° "	11	54	" 81¾ "	8	00	" 83 "	15	47
" 31½ "	19	44	" 1° W.	6	50	" 58¾ "	6	00	" 63¾ "	17	11
" 48¾ "	3	80	" 20¾ "	5	13	" 37¾ "	2	41	" 27¾ "	24	41
N 68¾ "	11	31	" 1° E	3	87	" 15½ E	8	00	" 34¼ "	24	15
" 50° "	10	50	" 45° W	4	40	" 52° "	15	73	" 54¾ "	4	50
" 41½ "	20	00	" 5° E	3	50	" 37 "	7	27	" 30¾ "	14	50
" 57¾ "	35	00	" 46° "	8	00	" 77¼ "	6	03	" 12 W	16	00
" 46° "	86	00	" 26° "	7	20	" 56¾ "	18	37	" 63½ "	14	50
" 73° "	67	00	" 40¾ "	11	58	" 57° "	3	76	" 40° "	11	60
" 61¾ "	22	00	" 25° "	10	50	" 79° "	6	31	" 38° "	7	50
" 27½ "	33	50	" 40½ "	26	60	" 43¼ "	5	17	" 84¾ "	140	98

TRAVERSE

OF THE "INNER BAY" OF SAN PEDRO TO BE EXCLUDED FROM SURVEY OF THE CLAIM.

	Chs	Lks		Chs	Lks		Chs	Lks		Chs	Lks
S 80 ½ E	10	84	S. 0½ W	6	58	N 46 ½ E	11	50	S. 67¼ W.	76	50
" 89¼ "	9	00	" 73¼ E	15	00	" 69½ "	11	50	" 34½ "	98	00
N. 76 ½ "	25	00	" 6½ "	16	00	" 58½ "	16	00	N 31¾ "	19	46
S 77 ½ "	9	90	N 24½ "	14	15	S. 34° "	89	00	" 70 32 W	125	20

Area within the exterior lines of the confirmed tract ... 44214 92/100 acres
do within the limits of the lands covered by the navigable waters of the "Inner Bay of San Pedro" connected with the Ocean and thereon to be excluded ... 994 68/100 do
do included in the boundaries specified by the Certificate along these lines ... 43119 13/100 do

NOTE BY COUNTY RECORDER. - THE ORIGINAL MAP IN PATENT IS ON A SCALE OF FORTY CHAINS TO THE INCH AND IS HERE REDUCED AS ABOVE TO ACCOMMADATE THE SIZE OF THIS BOOK.

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